Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

BONNIE J. KORESKO and
JOHN J. KORESKO, V,

Petitioner

v.

MARK FARLEY, SEATON ROSS, L.P., TOWNSHIP OF TREDYFFRIN, BRYN MAWR CUSTOM HOME, INC., and OLLIE BOWER,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a fundamental due process violation occurred when a state trial court and state appellate courts ignored and failed to address Petitioners properly raised federal claims under 42 U.S.C. §1983?

2. Whether a local subdivision Ordinance is constitutionally defective because it does mot require notice to adjoining land owners in all situations where their property rights will be permanently altered by operation of the proposed subdivision plan and contemplated development activity?

3. Whether the dearth of case law throughout the country on the question of whether encroaching roots from ancient boundary trees can be protected by prescriptive easement or equitable license requires clarification by this Court in cases involving 42 U.S.C.§1983

4. Whether Petitioners were denied fundamental due process when the state trial and appellate courts refused to properly adjudicate a petition for attorney disqualification due to conflict of interest, when such conflicted attorney was also a state actor who sought to aid deprivation of Petitioners' Property rights?

PARTIES TO THE PROCEEDING

Petitioner Bonnie Koresko is a citizen and resident of the Commonwealth of Pennsylvania. Petitioner John Koresko is an attorney and also a resident of Pennsylvania. At all times relevant to this case, Petitioners were the owners of residen-

tial real estate consisting of a house and a 1.3 acre parcel of land located in a very wooded part of Tredyffrin Township, Chester County, Pennsylvania. Ancient trees located on the Koresko property, but within a few feet of the boundary of an adjacent parcel, have grown naturally for decades to heights in excess of 75 feet. Roots and branches from the trees grew naturally and undisturbed across the boundary. Petitioners contend that this natural encroachment of the tree roots and branches created easements or other property interests in their favor. The destruction of certain of these roots, and the corresponding infringement by Respondents on Petitioners' property rights, precipitated the actions by Petitioners in the lower courts to seek equitable relief and/or compensation under the common law, the U.S. and Pennsylvania Constitutions, and 42 U.S.C. § 1983.

Respondent Tredyffrin Township, Chester County, Pennsylvania is a municipal corporation created and existing under the laws of the Commonwealth of Pennsylvania.

In its capacity as municipal government, Tredyffrin enacted subdivision ordinances as part of the Tredyffrin Township Code. The procedures, substance, and failure to enforce protections contained such ordinances were challenged in the lower courts and are the subject of this Petition.

Respondent Mark Farley is an adult individual and a citizen and resident of the Commonwealth of Pennsylvania. Mr. Farley was the land developer whose actions, which could only occur with the approval of Tredyffrin Township, resulted in the destruction of Petitioners' property.

Respondents Bryn Mawr Custom Home, Inc. and Seaton Ross, L.P. are entities controlled by Mark Farley that conduct business within the Commonwealth of Pennsylvania. At all relevant times Mr. Farley acted through these entities as well as in his own right in conducting the development activities which were subject of the Complaint advanced by Petitioners in the courts below.

Respondent Ollie Bower is the former owner of the tract of land adjacent to that of Petitioners developed by Mr. Farley (the "Bower tract"). Respondents Mr. and Mrs. Stephen Kay and Mr. and Mrs. Robert Grupp purchased and presently own the two houses Farley built on the Bower tract. The actions by Bower and Farley to subdivide the Bower tract into two lots, to build upon it, and thus cause damage to Petitioners' property was at various points approved or ratified by these parties in conjunction with the Township and Mr. Farley.

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OPINIONS BELOW

The opinion of the Chester County Court of Common Pleas is not a reported opinion and is included in the Appendix to this Petition.

The opinion of the Commonwealth Court of Pennsylvania is reported at 844 A2d 607 (Pa. Commwlth. 2003).

No opinion was issued by the Supreme Court of Pennsylvania in its denial of the Petition for Allowance of Appeal. by Order issued on August 9, 2004.

STATEMENT OF JURISDICTION

The Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied on August 9, 2004. This was a final decision from the highest appellate court of the Commonwealth of Pennsylvania. Jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. 1257 (a).

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

Constitution of the United States, Amendment XIV:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 United States Code, Section 1983: Civil Action For Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Title 42 United States Code, Section 1985-Conspiracy to Interfere with Civil Rights

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is

lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President, Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Constitution of the Commonwealth of Pennsylvania, Article 1, Section 1:

Article 1-Declaration of Rights

That the general, great and essential principles of liberty and free government may be recognized and unalterably established, WE DECLARE THAT –

Section 1. Inherent Rights of Mankind

All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Section 27. Natural Resources and the Public Estate

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people.

Title 53 Unconsolidated Pennsylvania Statutes Pennsylvania Municipalities Planning Code Article 9 §§ 1098, 10909; Article 10 §§ 1101-A to 11006

These portions of the Pennsylvania Unconsolidated Statutes are included in the attached Appendix

Code of the Township of Tredyffrin, Pennsylvania v. 26 Chapter 181-Subdivision and Land Development Article IV §§181-8 to 181-19

This portion of the Township Code is included in the attached Appendix.

STATEMENT OF THE CASE

In the courts below Petitioners advanced a properly pled action under 42 U.S.C. §§ 1983, and 1985. This cause of action as well as other Constitutional claims were simply ignored by the Pennsylvania courts. Petitioners sought to protect both substantive and procedural rights in the protection of their property interests, to wit: the lives of the ancient

trees located on their property, their right to the perpetual enjoyment of those trees, and their right to protect their property. The lower courts, in contradiction to well established principles of law and equity, held that Petitioners had no property interests worthy of protection. Those courts thus avoided the thorny questions of substantive and procedural rights protected by the U.S. Constitution and enforceable under 42 U.S.C. § 1983 et seq. The Township of Tredyffrin approved a subdivision plan for the Bower parcel adjacent to land owned by Petitioners. The subdivision plan was approved without any notice to the Petitioners because the Township's Subdivision and Land Development Ordinances do not require any such notice. The Bower parcel and Petitioners' property are located in a highly-wooded area zoned for single-family residential use. The properties share a 200 foot boundary line. Located on Petitioner's land next to the boundary line is a row of ancient trees. The trees are all over 50 feet tall and have an age averaging 68 years. Both branches and roots of these trees have grown naturally and unabated, 20 feet or more across the boundary onto the adjacent Bower tract. The growth of both branches and roots over the boundary line has continued unabated for well beyond 21 years.[1] Pursuant to development activity apparently permitted by the subdivision plan, Respondents amputated

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[1] An arborists' expert report, introduced as evidence below and presented here as Appendix M opines that the roots and branches have grown continuously on the Brower tract for a far longer time – averaging 64 years. Pennsylvania's minimum period for vesting of prescriptive rights is 21 years. *See Lewkowicz v. Blumish*, 442 Pa. 369, 275 A.2d 69 (1971).

the roots of the boundary trees, resulting in substantial damage and certain death of the trees.

Several months after Tredyffrin approved the subdivision plan, Petitioners discovered that Respondent owners and developers were about to begin construction on the Bower tract. Petitioners contacted the Township and its solicitor and requested that the Township refrain from issuing building permits. The request was denied and Petitioners were informed by the Township representatives that they had no right to stop the construction. Petitioners commenced suit in the Court of Common Pleas of Chester County, Pennsylvania. The complaint advanced causes of action for trespass, interference with easement, violations of due process rights, unlawful taking and violation of 42 U.S.C. §1983, appropriate equitable relief to prevent further damage, restitution and removal of offending uses.

Prior to the commencement of this case, William Lamb, the Tredyffrin Township solicitor, represented Petitioner John Koresko and his law firm in a related collection matter against Respondent Mark Farley. Before Petitioners had any notice of the subdivision plan, Mr. Lamb's firm acted as counsel in execution proceedings leading to levy against the Bower tract where the subdivision construction was scheduled. Judge Robert Shenkin, the same lower court judge in this case, stayed the execution proceedings upon the posting of bond by Mr. Farley.

On June 25, 2001 Petitioner John Koresko met with Mr. Lamb and others. Petitioner's concern was that in the course of his representation by Mr. Lamb and his firm, they were privy to confidential information that involved the property subject of the now disputed subdivision activity. Petitioner

was told that Mr. Lamb and his firm would be representing the Township in the instant case, but would take only a passive role in the dispute. Mr. Koresko, having raised the conflict issue, was assured that Mr. Lamb and his firm would not engage in any action adverse to Petitioner's interest. On this basis Mr. Koresko waived the potential conflict.

Approximately a year into the litigation Lamb's position changed. It became clear that the Lamb firm and the Township were acting in concert with Mr. Farley in the discovery process. More importantly, Mr. Lamb sent a letter to Mr. Koresko threatening an abuse of process action. In response Mr. Koresko wrote to Mr. Lamb stating the actions were in conflict with the June 25th agreement. Because the Lamb firm was representing the Township in an action that was directly adverse to Petitioners' interest, while continuing to represent Mr. Koresko in the collection matter, Mr. Koresko asked Mr. Lamb to withdraw from representing the Township. Lamb refused to do so and instead had his firm terminate its representation of Mr. Koresko in the other collection and levy matter involving Mr. Farley and the Bower tract.

Petitioner Koresko moved for the disqualification of Mr. Lamb. The trial court did not address the merits of the issue or hold any form of evidentiary hearing. It avoided any disposition by deeming the motion moot in light of its ruling on the underlying property right. The conflict of interest issue has been repeatedly raised in all of the lower courts and ignored. During the pendency of the appeals, Mr. Lamb, former Chairman of the Chester County Republican Party, received a political appointment to a vacant seat on the Pennsylvania Supreme Court. Governor Mark Schweiker

conditioned that appointment on Lamb's agreement not to subsequently seek election to retain the seat.

There has been no dispute that the Township Ordinance at issue contained no requirement to give any notice to adjoining landowners like Petitioners and that the ancient trees were mortally damaged as a result of the development. The trial court, in disposing of Petitioners' Motion For Partial Summary Judgment and Respondents' Motions for Judgment on the Pleadings, declined to acknowledge the existence of any property right of Petitioners. The trial court never addressed the cause of action clearly alleged under federal aw or any of Petitioners' constitutional claims, but nevertheless entered final judgment against Petitioners. Petitioners sought leave to amend pleadings prior to the filing of dispositive motions but leave was denied. Petitioners filed a timely appeal as to all issues.[2]

On appeal to the Commonwealth Court, Petitioners again raised the lack of notice requirements in the Tredyffrin Subdivision Ordinance, along with the nature of the Petitioners' property interests and infringement of same by Respondents. The Commonwealth Court noted that this was a "case of first impression" and affirmed the lower court's finding that no easement or other property right existed as to the tree roots. The Court also affirmed the lower court's refusal to permit

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[2] The Notice of Appeal was originally filed with the Superior Court of Pennsylvania. A motion was made on behalf of Tredyffrin Township to Transfer the Appeal to the Commonwealth Court which is the appropriate intermediate appellate court for disputes involving local governments. The Motion was granted and the matter proceeded in the Commonwealth Court.

amendment of pleadings, and held that the Pennsylvania Municipalities Planning Code was the excusive vehicle for challenging the validity of the subdivision. The equity actions were deemed to be moot. Of particular note are the issues the Commonwealth did not address in any fashion despite their having been raised by Petitioners. Petitioners asserted that the Township, the Developer, and property owners acted under color of state law to deprive Petitioners of their constitutionally protected rights to the use and enjoyment of the boundary trees. No mention was made by the Commonwealth Court of the questioned municipal ordinance or lack of notice, nor was there any mention made of the failure to enforce certain tree protection laws equally as to all citizens. The Court in very brief terms agreed with the lower court's denial of Petitioner's motion to disqualify Lamb's firm from representing the Township. The Court took no issue with the sparse record and litigation against a recent client whom Lamb dropped like the proverbial "hot potato."

A Petition for Allowance of Appeal was filed timely in the Pennsylvania Supreme Court. Petitioners advanced as reasons for granting an appeal: (1) the lower courts erred in holding that Petitioners had no property interest; (2) the actions of the Respondents herein impaired fundamental liberty and property interests of Petitioners in violation of the Constitutions of Pennsylvania and the United States; (3) Petitioners as adjoining landowners most likely to be harmed had standing to enforce provisions of the subdivision plan and complain about violations of restrictions and ordinances; and (4) the lower court's refusal to promptly address disqualification of the Lamb firm prior to making decisions on the merits cast an unacceptable pall over the proceedings as

Township Solicitor Lamb was also a state actor. The Pennsylvania Supreme Court denied the Petitions without opinion by Order on August 9, 2004.

REASONS FOR GRANTING THE WRIT

I. The failure of any of the lower courts to address the constitutional claims raised by the petitioners under 42 U.S.C. §1983 was a violation of due process

The Petitioners in Count V of their Complaint as filed in the Court of Common Pleas of Chester County, Pennsylvania (Appendix H) stated:

> "93. The allegations of the preceding paragraphs are incorporated by reference.
>
> 94. Plaintiffs have been denied their property rights without compensation or due process of law by the actions of the Defendants Farley and Bower in concert with Defendant Tredyffrin Township, its supervisors, employees, and agents, in violation of the Constitution of Pennsylvania and the United States of America and the applicable provisions of state and federal law.
>
> 95. Plaintiffs are entitled to equitable or legal relief in order to restore their property rights to a position existing prior to the grant of the Subdivision, or to be compensated through restitution for an unlawful taking."

Petitioners submit that these paragraphs, read in conjunction with the facts and allegations as pled in the incorporated

paragraphs, set forth both state and federal constitutional claims.

The claims advanced by Petitioners are on a par with those advanced in the matter of *Jordan v Fox, Rothschild, O'Brien and Frankel*, 20 F3d 1250 (3rd Cir. 1994). The Plaintiffs in *Jordan* sued when their lessor, acting through its attorneys, garnished funds in a bank account after obtaining a judgment by confession. The Third Circuit Court of Appeals held that the then current Pennsylvania procedures for executions upon confessed judgments violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution because defendant law firm, under the color of Pennsylvania civil procedures, "caused the state to forcibly to deprive [plaintiff] of its property without the pre-deprivation notice and hearing due process requires." *Id.* at 1267. In order to prevail on their federal claims, Petitioners must establish (1) the violation of a federally protected constitutional or statutory right, (2) by state action or action under color of law. *Id.*; *see Flagg Bros., Inc. v Brooks*, 436 U.S. 149, 156 (1978).

The Petitioners' Complaint in the lower courts was sufficient in that it alleged notice was not given before Petitioners were deprived of their property rights under the Subdivision Plan and subsequent development. The Township acted through its solicitor, Mr. Lamb, its manager, Mr. Joseph Janasak, and other Township employees. The Respondents acted under the Township's procedures for approval of subdivision plans, permits, and ongoing inspections of the construction activities conducted by Farley. The Township approved the development plan and issued the permits to Bower and Farley wherein the Petitioners' property was

taken without notice and compensation. Farley could not have acted absent the initial Township approval and continued satisfaction of Township inspectors who supervised construction and allowed it to continue despite clear deviations from the subdivision plan and the Township Code. These are clear 14th Amendment violations for which redress may be had under the Constitution and 42 U.S.C. § 1983.

Petitioners' complaint alleges not only the direct deprivation of property rights but also the constitutional defect in the Township ordinance. A crucial point in this assignment of error is that none of the lower courts fulfilled their constitutionally mandated duties by ignoring the federal claims, and the state appellate courts simply ignored them despite proper preservation of the issues and substantial briefing on appeal.

The Constitution charges the judicial branch of government with the duty of maintaining justice. The court system is supposed to work for the people. The Constitution defines the things the courts cannot do as well as those things the courts must do. Courts cannot simply duck federal questions that are properly raised. This tenet has been part of American jurisprudence since the beginning of this country. As Chief Justice Marshall said in Cohens v Virginia, (6 Wheaton) 19 U.S. 264 (1821):

> "It is most true that this court will not take jurisdiction if it should not, but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be

> brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be *treason to the Constitution*. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously perform our duty."

The Courts below did not perform their constitutional duty. None of them addressed the Petitioners' claim under 42 U.S.C.§1983. The most fundamental violation of due process has thus occurred, in violation of the 14th Amendment. To redress this constitutional violation, the Court should grant certiorari and issue a summary reversal.

II. The Tredyffrin Township Subdivision Ordinance is constitutionally defective as it fails to give notice to property owners whose property rights will be permanently altered by a proposed subdivision plan

The Tredyffrin Township Code contains in its Article III §181-7 et seq. (Appendix B) the ordinance(s) which set forth the procedures to be followed to obtain approval of a subdivision plan. The procedures to be followed depend on the classification of a subdivision as "major" or "minor". While the subject ordinance provides for public notice and hearing as to major subdivisions, there are no provisions for any type of notice as to "minor" subdivisions. The lack of notice is most notably demonstrated in the testimony of Joseph Janasek (Appendix I), the township manager, when he states: "There's no notice required. Certified letters are not sent in

any cases." (Appendix I, p. 9). The operation of the ordinance makes no provision for notice by either the township or land developer to adjoining property owners who may be affected by a proposed subdivision plan. This is a remarkable, constitutionally archaic deficiency in that the rights of an adjoining property owner could be protected by the simple requirement of a letter and the expenditure of postage for certified mail. In its present form an affected property owner only gets notice when the bulldozers begin to dig and the harm is already inflicted.

The lower courts and the Respondents have taken the position that no notice was required because under the particular circumstances of this case Petitioners had no cognizable property right. A brief examination of Pennsylvania law on the subject demonstrates the existence of a property right whether by prescriptive easement or permanent license.[3]

As the Commonwealth Court noted in its opinion (Appendix C) the question of whether a prescriptive easement over land arises from encroaching tree roots is one of first impression in Pennsylvania. However, prior Pennsylvania jurispru

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[3] Petitioners' claim arises from their interest in the tall trees that formed a natural boundary line between Petitioners' and the adjoining property. The interest is either and easement or a permanent license. The exact nature of the property interest may be subject to differing interpretations. What is clear is that under color of law a property right was exposed to deprivation. The builder did not list the trees on the subdivision plan. The subdivision plan provided for a 6 feet deep excavation along the boundary line, withing the dripline of Petitioners trees, for a driveway and utility lines. The excavation ripped right through the roots of the trees, which are now dying.

dence provided an alternative basis upon which to answer this question in the affirmative. The Pennsylvania Superior Court in *Jones v Wagner*, 425 Pa. Super 102, 624 A2d 166, *alloc. denied*, 536 Pa. 626, 637 A2d 286 (1983), recognized that prescriptive easements regarding tress could give rise to a cause of action in Pennsylvania. On the issue of tree branches creating an easement by prescription the Superior Court commented:

> "We cannot help but wonder whether the continued presence of encroaching tree branches, held openly, notoriously, hostility, and continually for 21 years would create a prescriptive easement in the airspace in which they hang. If this would be the case, and we can find no Pennsylvania law which would indicate that a prescriptive easement is not available in this situation, a land owner who suffers actual harm for the first time during the tree owner's twenty-second year of hostile ownership, might very well be precluded from seeking a judicial, or even a self-help remedy. This result while not entirely unforeseeable, is anomalous. However, if an action is available without a showing of damage, the land owner has no reason to complain if a neighbor's tree causes damage after the prescriptive period has run."

525 Pa. Super. at 112, n. 3, 624 A2d at 171, n. 3.

Alternatively the Petitioners asked the lower courts to consider the holding of *Morning Call v. Bell Atlantic Properties*, 761 A2d 139, 2000 Pa. Super 294 (2000). There the Superior Court recognized an equitable property right, "irrevocable license," for encroachments and uses of many dec

ades which do not quite fit the definition of prescriptive easement. Rather than find under Pennsylvania law the existence an easement, or alternatively, an irrevocable license, the Commonwealth Court ignored its sister appellate court entirely and instead adopted the reasoning of a Kansas *intermediate* appellate court, *Pierce v Casady*, 711 P2d 766 (Kan. Ct. App. 1985). *Pierce* was inapposite and incorrect in articulating the law of shared use and easements as to tree branches, especially as such uses exist in modern society.

While the Pennsylvania Supreme Court has not made a specific declaration as to the nature of the interest created in circumstances described in this case, and intermediate courts are in conflict, a property right does exist. The Pennsylvania Constitution, Article I, §27 provides:

> "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all people."

A property owner, by virtue of his ownership of the land and the trees upon it, has a right to preserve environmental resources over which he has dominion. Under Article 1, section 1, of the Pennsylvania Constitution, the landowner has the express right to protect his property. Local governments under Pennsylvania's Constitution, Article 1, section 27 likewise have a duty to preserve and protect natural resources like trees. The private rights and public duties inter

sect. Not only does the private land owner have a property right in the trees, *but also the accompanying right to the enjoyment of the same*. Government has the affirmative duty to maintain and enforce its mandate to preserve the lives of trees, especially when it exercises dominion over public property or submits private property to government control by regulating the privilege of subdivision. The courts below forgot that the *privilege* of subdivision, regulatable under the police power of government, can never trump the *rights* of private property owners or the beneficiaries of a constitutionally-mandated public trust.

These rights are no less real than other property rights consistently recognized by this Court. In *Loretto v Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the restriction of the use of water was found to be a property right with a significant impact since the restriction of use extinguished all property value Id. at 319. In reaching this conclusion, the Court analogized the case to *United States v Causby*, 328 U.S. 256, 265, 66 S.Ct. 1062, 1067, 90 L.Ed. 1206 (1946), in which frequent flights immediately above a landowner's property were akin to a physical taking. "Even if the Government physically invades only an easement in property, it must nonetheless pay just compensation." *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); citing *Causby, supra.* The same rule must apply when a developer, given permission to act by the state, disregards an easement or irrevocable license, or simply takes an action that harms a neighbor's trees. The approval of the subdivision plan, issuance of permits, and allowance of the activities thereunder permitted the developer to kill ancient trees by amputating their roots. [Appendix M-Arborist Report.] This occurred

despite Tredyffrin's pre-existing ordinances that barred construction within the dripline of any tree. The trees as corporeal works of nature, and Petitioners' intangible right to enjoy their beauty and positive contribution to the environment, are no less protected property interests than the rights to use of water and air space without interference by government.

Petitioners submit that the existence of protected property rights is clear. As such, constitutional and statutory protections attach. Under the 14th Amendment to the United States Constitution as well as Article I, §1 of the Pennsylvania Constitution, all persons possess a protected interest in the possession, protection, and enjoyment of all their property, whether tangible (trees) or intangible (enjoyment). This Court has repeatedly ruled that the procedural rules of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter protected status of a liberty or property interest. *R v Com. Dept. of Public Welfare*, 535 Pa. 440, 451, 636 A2d 142, 147 (1993) quoting *Paul v Davis*, 424 U.S. 693, 710-711, 96 S.Ct. 1155, 1165, 47 L.Ed. 2d 405, 419 (1976) (footnote omitted).

The Due Process Clause of the Fourteenth Amendment requires at a minimum that the deprivation of life liberty or property must be preceded by notice and opportunity for hearing appropriate to the nature of the case. *Mulane v Central Hanover and Trust Co.*, 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1950). The Due Process Clause requires states to make efforts to provide notice to all parties whose interests are affected by proceedings in front of a tribunal. Where parties assert rights in the same piece of property, one party cannot claim the right under operation of statute without

proper notice to anyone whose rights may be affected. *Sniadach v Family Finance Corp. of Bay View*, 395 U.S. 337, 23 L.Ed. 2d 349, 89 S.Ct. 1820 (1969) (Wisconsin garnishment statute struck down for failure of notice provision); *Fuentes v Shevin*, 407 U.S. 67, 32 L.Ed. 2d 556, 92 S.Ct. 1983 (1972) (invalidating state replevin law which permitted ex parte procedure to seize goods; *North Georgia Finishing, Inc. v DiChem, Inc.* 419 U.S. 601, 42 L.Ed. 2d 751, 95 S.Ct. 719 (1975) (invalidating an *ex-parte* garnishment statute).

In the present case, Petitioners received no notice because notice under the ordinance is not required. Consequently, there was no opportunity or mechanism for Petitioners to voice opposition to a proposed subdivision or present evidence on their behalf as to the adverse effects to their property interests. This is what due process requires and its absence demonstrates the primary constitutional infirmity of the Tredyffrin Township Ordinances. It was error for the lower courts to ignore the federally protected rights of the Petitioners.[4]

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[4] Respondents have asserted that Petitioners did not have standing to bring the action as they were required to exhaust remedies under the Pennsylvania Municipalities Code 53 P.S.§10900 et seq. The administrative remedy was not exclusive. See *Matthews v Eldridge*, 242 U.S. 319, 98 S.Ct. 893 (1976) n.10. Availability of administrative remedies does not preclude raising constitutional claims in a court of competent jurisdiction. The Municipality Planning Code (MPC) does not trump the Fourteenth Amendment or 42 U.S.C. §1983. Moreover, any conceivable remedy under the MPC became effectively moot as Petitioners 'notice' was the destruction of their property.

III. The absence of state law necessitates this Court's clarification of the property right especially as it relates to claims under 42 U.S.C. §1983

Although the facts of this case are local in nature, there is an important national environmental issue to be resolved. In the absence of particular state law on an issue, the federal law will be authoritative. Blind and harsh application of common law is simply not appropriate in modern times. For example, the common law through much of history provided that a landowner's property rights extend from the ground to the heavens. The development of air travel caused modification of the common law to contemplate protection of only the air space a landowner could reasonably use. Just as air space rights required rearticulation of the common law so does the law as to ancient trees and the encroachment of root systems. The majority of persons in this county no longer live in rural communities. Subdivisions and property development has continued and communities are now comprised of neighbors who share property and tree lines in close proximity. There is a paucity of either statutory or case law. None of the cases provide any real guidance as to the nature of the property right and the protections attached thereto. It is necessary for this Court to clarify the law relating to encroaching tree roots and its effect all Americans who share boundaries with properties subject to future development.

This case presents one of those rare opportunities to fashion the common law in the United States.[5] The Court can

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[5] Petitioner's research discloses that at least 35 states appear to have not addressed the issues of prescriptive easement or irrevocable license in relation to encroaching tree roots. Most of the

state unequivocally that the right to enjoy a tree, and the right to protect it from destruction, is protected under the Constitution. Furthermore, the Court can eliminate another of those self-help remedies that barely breathe within the common law but are disfavored and almost extinct in modern society. Self-help remedies tend to cause social problems in a complex society like ours. The present case is conceptually no different than cases like *Sniadac,supra*, *Fuentes, supra*, and *North Georgia Finishing, Inc., supra* which struck down other types of self-help remedies absent notice of intent to harm a property right. *"False is the idea of utility that sacri*

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cases considering the issue have not reached the states' highest courts. In the absence of a state's declaration of common law, or an erroneous one, this Court's articulation of the common law can be binding, especially in cases litigated in federal courts. *See,* Van *Horne's Lessee v. Dorrance*, 2 Dall. 304, 310 (1795). After referring to various provisions of the constitution of Pennsylvania, Justice Paterson maintained, "it is evident that the right of acquiring and possessing property, and having it protected, is one of the natural, inherent and inalienable rights of man.... The legislature therefore had no authority to make an act divesting one citizen of his freehold, and vesting it in another, without just compensation. It is inconsistent with the principles of reason, justice and moral rectitude; it is incompatible with the comfort, peace and happiness of mankind; it is contrary to the principles of the social alliance, in every free government; and lastly, it is contrary to the letter and spirit of the constitution." *Id.*, at 310. See also, *Fletcher v. Peck*, 10 U.S. 87 6 Cranch 87, 3 L.Ed. 162 (1810) (property rights protected from local attempts to impair title), *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816); *Cohens v. Virginia*, 19 U.S. 264 (1821) (review of unconstitutional state court decisions).

fices a thousand real advantages for one imaginary or trifling inconvenience. . . ." Thomas Jefferson, Commonplace Book, 1774-1776.

California states a compromise rule in *Booska v. Patel,* 24 Cal.App.4th 1786 (1994). In *Booska*, the defendant had severed roots that extended under his property from a large ornamental tree that was part of the landscaping of the plaintiff's neighboring backyard, essentially killing the tree and forcing the plaintiff to have it removed. The *Booska* court acknowledged the ancient common law rule that a landowner has the right to cut the branches or roots of a neighbor's tree to the extent that they encroach onto the landowner's property, but held that this right is no longer absolute. The Court of Appeal held *that the right of landowners to trim trees encroaching onto their land is subject to a reasonableness standard. Booska, supra,* 24 Cal.App.4th at 1791-1792.

The New York and Connecticut courts protect all tree parts from unilateral, self-help destruction by adjoining landowners only when the trunks are bisected by the property line separating their respective lands. *Van Allen v. Town of Kinderhook.*, 263 N.Y.S.2d 491; 47 Misc. 2d 955 (Sup. Ct. 1965) *citing Robinson v. Clapp*, 65 Conn. 365 (1895). Those courts toiled with the old common law rule that allowed self-help cutting of roots but found it logical to bar such actions if the trunk were shared by both. *Under this "shared trunk" theory, either landowner has "the right to demand that the owner of the other portion shall so use his part as not unreasonably to injure or destroy the whole."* This rule, while slightly more enlightened, retains an artificial and scientifically irrelevant distinction. There is no

logic in protecting all tree roots from destruction simply because a tree trunk is 1/1000th of an inch across a boundary line, yet affording no protection to the vitally important roots because the trunk comes through the ground 1/1000th inch to the other side of the line. This rule also presupposes the fiction that roots are somehow less important than trunks, and that a person has is no property right in the enjoyment of the tree attached to his property as a living creature of Nature.

Remarkably, the *Van Allen* court, citing *People v. Sutherland*, 252 N. Y. 86 (1929), recognized the possibility of prescriptive easements related to encroaching tree parts. In contrast, the Pennsylvania Commonwealth Court in this case joined the Kansas intermediate appellate court in *Pierce v. Casady*, 11 Kan. App. 2, 711 P.2d 766 (Ks. Ct. App. 1985), holding fast to the old common law self-help rule. *Pierce* involved about a split tree whose limbs were a potential danger to structures on a neighbor's property. The Kansas court allowed the neighbor to trim the tree limb back to the property line. However, the Kansas court clearly erred in saying "there is no case law indicating that an easement by prescription may be obtained by overhanging tree branches." There may have been no Kansas authority, but *Van Allen* and other cases, *see infra*, were decided 20 years or more earlier, and the law of prescriptive easements is older than that.

As stated previously, the Pennsylvania Superior Court in *Wagner v Jones*, 425 Pa. Super. 102, 624 A.2d 166 (1993) agreed with *Van Allen* and recognized the possibility of a prescriptive easement for encroaching tree parts. Admittedly, these reflections were in dicta, but a logical proposition of law stated in dicta does not render it erroneous. Even if those courts took the theory of prescriptive easements too

far, the Pennsylvania Superior Court recognized in *Morning Call v. Bell Atlantic, supra*, the theory of "irrevocable license" for long-standing uses of a servient tenement which do not quite satisfy all the requirements of prescriptive easement. "Irrevocable license" is commonly equated by scholars to the term "equitable easement." This theory has also found favor in California. For example, in *Hirshfield v. Schwartz*, 91 Cal.App.4th 749 (2001), the Court of Appeal held that an injunction granted to protect an encroachment from destruction was an equitable remedy, rather than an exclusive prescriptive easement. Essentially, the *Hirshfield* court applied the modern "reasonableness standard" of *Booksa* to discourage self-help and encourage the same equitable result *Morning Call* teaches in Pennsylvania.

Most important to this Court's consideration is the wisdom of the Pennsylvania Superior Court in *Jones v. Wagner, supra,* and its consideration of the limited amount of authority from other jurisdictions. *See generally*, Annotation, *Encroachment of Tree, Shrubbery, or Other Vegetation Across Boundary Line*, 65 A.L.R.4th 603. The *Jones* Court concluded: "Under the laws of those [aforesaid] jurisdictions who have confronted the issue, and henceforth ours, a showing that encroaching tree limbs, branches, or roots have caused sensible damage is not a pre-condition to exercising a self-help remedy." *Jones*, at 425 Pa. Super. 106. This rule should be the constitutional law of the United States when the self-help destruction of a Neighbor's tree roots ensues from a subdivision and construction procedure created, conducted, reviewed, approved and supervised by municipal officers, their agents, and the persons to whom they extend the privilege of development. A local government is liable for

implementation of an official policy, no matter how promulgated, if the policy acts to deprive a person of a federally protected right. Such a policy must be a deliberate or conscious one "made by lawmakers or by those who edicts or acts may fairly be said to represent official policy . . ." *Monell v. Department of Social Services*, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978). Citizens have the right to expect that government will not give aid to those who seek to destroy property rights. Modern society has finally evolved to acknowledge the aesthetic value of trees, especially when our citizens see fewer and fewer of them. Science tells us that trees are essential to produce the oxygen which sustains our lives. Tredyffrin Township had an ordinance that actually demanded that no construction activities occur where it is likely that tree roots grow. The supreme law of this nation needs to evolve accordingly for the benefit of all Americans.

IV. The failure of the lower courts to address the issue of the disqualification of William Lamb, Esq. and his firm denied Petitioners' their right to due process of law.

Part of the record in the case below includes a Motion by Petitioners to Disqualify William Lamb, Esquire supported by the affidavits of John Koresko, Esquire and Virginia Miller, Esquire (Appendix J). As stated more fully in pp. 8-10, *supra*, Petitioner John Koresko, the sole shareholder of Koresko and Associates, P.C., initiated a fee collection matter against Mark Farley in the Court of Common Pleas of

Chester County, Pennsylvania. Judge Shenkin was also the assigned trial judge in that matter.

In June 2001 as part of this collection matter, before any construction began on the adjoining parcel of land, Petitioner John Koresko retained William Lamb, Esq. and his firm, Lamb, Windle and McErlane, P.C. as co-counsel with Virginia Miller, Esq.[6] The Lamb firm began execution proceedings in the collection matter against the same piece of land that was part of the now challenged sub-division plan. At all relevant times, Mr. Lamb or members of his firm acted as the Solicitor of Tredyffrin Township, and gave Respondents the information that "they had no rights" to stop the developer Farley from pursuing his building permits. Petitioner shared with Mr. Lamb and members of his firm confidential and privileged information relating to Mr. Koresko's strategies involving litigation with the same Mr. Farley.

Regardless of previously waiving Lamb's conflict as Township Solicitor when Lamb assured Petitioner that the Township would remain neutral in the present action, Petitioner revoked his waiver and demanded that Lamb resign once Lamb demonstrated no further neutrality. Lamb then terminated his relationship with Petitioner in a letter stating that given the firm's long relationship with the Township and the "very small matter" in which it represented Petitioner, it was dropping Petitioner as a client. (Appendix J. Miller Af

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[6] Ms. Miller is a Major in a Special Operations Combat C130 Air National Guard Unit subject to deployment at any time. Following the attacks of September 11, 2001, she was deployed overseas twice. As such, the Lamb firm's involvement in this matter became more than just local counsel.

fidavit). Lamb actually threatened Respondents, and his firm vehemently litigated this case against Respondents. Lamb's firm secured a judgment against Respondents.

Petitioners filed the appended Motion To Disqualify. Judge Shenkin never scheduled an evidentiary hearing or required Mr. Lamb to explain himself under oath. The Motion was given cursory treatment *and then deemed moot because the trial court granted judgment on the pleadings.* Despite presentation of the issue by Petitioners, the Commonwealth Court made no determination as to the propriety of the Lamb firm's actions or the lack of an evidentiary record at the trial court level. Most notably, the Commonwealth Court avoided any discussion of the unprecedented holding of the trial court, that *it did not have to rule on a disqualification motion when made since the apparently conflicted attorney eventually succeeded subsequently in having the case resolved with prejudice against his first client*! The Pennsylvania Supreme Court in its August 9, 2004 order did not comment on any aspect of the case, despite the repugnance of the holding below.

Ordinarily this type of procedural problem might not merit constitutional scrutiny. However, the facts of record con and newspaper reports in the Appendix support Petitioner's contention that the refusal by the lower courts to deal with the issue was a *de facto* deprivation of the right to due process.

As noted, Mr. Lamb was the Tredyffrin Solicitor and was also former chairman of the Chester County Republican Party At the time this case was appealed to the Commonwealth Court, Mr. Lamb was appointed by a Republican

governor to the Supreme Court of Pennsylvania[7] - the court with supervisory authority over the Commonwealth Court and trial Judge Shenkin. During Lamb's time as a Justice of the Pennsylvania Supreme Court, the Commonwealth Court faced the uncomfortable prospect of subjecting a sitting Justice to criticism of his ethical responsibilities. Despite the difficulties, Petitioners were entitled to proper consideration of the matter, and the trial court under these circumstances should have permitted the development of an evidentiary record. The Commonwealth Court simply compounded the problem by ignoring it. It would be difficult to question the professional conduct of a sitting Supreme Court Justice, who was a Township Solicitor and a state actor with potential liability under 28 U.S.C. § 1983.

Petitioners raised the issue one last time in the Pennsylvania Supreme Court. Any appellate court should be concerned with a precedent that allows an attorney in a conflict of interest situation to litigate a case to conclusion and have that conflict disregarded without a hearing because the conflicted lawyer prevailed on the merits. More disturbing is what the Pennsylvania Supreme Court already knew as it considered the instant case. During his very short time on the bench, then-Justice Lamb did not recuse himself in connection with a zoning case involving one of his law firm's clients. See Appendix S. The matter was no doubt of some embarrassment to the Court. In light of the failure of the Pennsylvania Supreme Court or the Commonwealth Court to even opine on the issues addressed herein, Petitioner can

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[7] Mr. Lamb had never served as a judge prior to his appointment to Pennsylvania's highest court.

only ask this Honorable Court to question why the judges and justices refused to consider the possibility that the process had been tainted. In this case, the appearance of impropriety reached constitutional proportions because the state actor at the heart of the controversy had apparent influence over the process and judicial review was so cursory.

CONCLUSION

For all of the forgoing reasons Petitioners respectfully request the Court grant certiorari and summary reversal and/or all appropriate relief consistent with the issuance of the Writ.

Respectfully submitted,

John J. Koresko, V., Esquire
Petitioner Pro Se and on behalf of Bonnie Koresko
200 West Fourth Street
Bridgeport, PA 19405
(610) 992-2200

(3)

Supreme Court, U.S.
FILED

04 661 NOV 8 2004

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

BONNIE J. KORESKO and
JOHN J. KORESKO, V,

Petitioner

v.

MARK FARLEY, SEATON ROSS, L.P., TOWNSHIP OF TREDYFFRIN, BRYN MAWR CUSTOM HOME, INC., and OLLIE BOWER,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

APPENDIX

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APPENDIX

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APPENDIX A – FINAL ORDER OF SUPREME COURT OF PENNSYLVANIA OF AUGUST 9, 2004

JOHN J. KORESKO, V	:	No. 290 MAL 2004
AND BONNIE J. KORESKO	:	Petition for Allowance
v.	:	of Appeal from the
MARK FARLEY, SEATION	:	Order of the
ROSS, L.P., TOWNSHIP	:	Commonwealth Court
OF TREDYFFRIN, BRYN	:	
MAWR CUSTOM HOME, INC.	:	
AND OLLIE BOWER	:	
	:	
PETITION OF: BONNIE J.	:	
KORESKO	:	
	:	
JOHN J. KORESKO, V AND	:	No. 313 MAL 2004
BONNIE J. KORESKO	:	Petition for Allowance
v.	:	of Appeal from the
MARK FARLEY, SEATON	:	Order of the
ROSS, L.P., TOWNSHIP	:	Commonwealth Court
OF TREDYFFRIN, BRYN	:	
MAWR CUSTOM HOME, INC.	:	
AND OLLIE BOWER	:	
	:	
PETITION OF: JOHN J.	:	
KORESKO, V.	:	

ORDER

PER CURIAM

AND NOW, this 9th day of August 2004, the Petitioners for Allowance of Appeal are hereby **DENIED.**

APPENDIX B – ARTICLES III AND IV §§ 181-7 TO 181-19 OF TREDYFFRIN TOWNSHIP CODE

ARTICLE III, Subdivision and Land Development Control

§ 181-7. Subdivision and land development control.

A. No subdivision or land development of any lot shall be effected and no street, alley, sanitary sewer, storm drain, water main or other improvement in connection therewith shall be laid out, constructed, opened or dedicated for public use or travel or for the common use of occupants of buildings abutting thereon, except in accordance with the provisions of this chapter.

B. No lot in a subdivision may be sold, no permit to erect, alter or repair any building on land in a subdivision may be issued and no building or other improvement may be erected or constructed or installed in a subdivision until:

(1) A subdivision plan has received final approval and, where required, has been recorded; and

(2) The required improvements in connection therewith, including but not limited to roads, storm water detention basins and other related drainage facilities, water mains and sewer lines, recreational areas, buffer areas and common open space areas, have either been constructed in accordance with the final plan specifications or the township has been assured, by means of a proper completion guaranty in accordance with Article VII of this chapter, of their subsequent construction, completion and installation.

C. No unit in a condominium development shall be sold unless and until a plan declaration, filed pursuant to the provisions of the Pennsylvania Uniform Condominium Act (Act of July 2, 1980, P.L. 268, as amended, 68 Pa.C.S.A. §3101 et seq.) has been both approved and recorded by the township.

D. The scope of this chapter shall include all matters over which, by law, the township is authorized to exercise control enactment and enforcement of this chapter, including but not limited to:

(1) All improvements within any tract undergoing subdivision or land development.

(2) The improvement of public facilities, adjacent to any tract undergoing subdivision or land - development, including streets and drainage facilities which border upon any such tract.

(3) The installation or enhancement of off-site improvements needed to adequately serve the subdivision or land development.

ARTICLE IV, Subdivision Procedures

§181-8. Township review

Final authority for approval or denial of approval for all preliminary and final subdivisions plans shall be vested in the Board of Supervisors. Prior to action by the Board of Supervisors, all such plans shall be referred to the Township Planning Commission for review and recommendation; provided, however, that the failure to make such referral and/or the failure of the Planning Commission to review and/to make a recommendation with respect to any such plan shall not affect the validity of any action taken by the Board of Supervisors with respect to any such plan.

§181-9. Major and minor subdivision applications.

A. For purposes of procedure, all applications shall be classified as either major or minor:

(1) Major: any subdivision other than a minor subdivision.

(2) Minor: any subdivision in which all of the following criteria are met:

(a) No street is to be constructed or widened.

(b) No other public improvement is to be constructed which is intended to be dedicated to the township, the state or to common use in a common development.

(c) No land disturbance activities will take place except those incidental to construction of a single-family dwelling on each lot.

(d) No more than five lots are created.

B. Major applications shall be subject to all review procedures specified in this article.

C. Where an application qualifies as a minor subdivision under the terms of this section, the applicant may, at the discretion of the Planning Commission, seek approval according to the following procedures:

(1) A sketch plan may be submitted and reviewed in accordance with §§ 181-12 and 181-13 regarding preliminary plans shall be waived, except that written comments on the sketch plan shall be presented by the Planning Commission to the applicant within the time

period specified in § 181-13B(3) of this chapter.

(2) A final plan shall be submitted and reviewed in accordance with the applicable provisions of §§ 181-14 and 181-15. As part of the final plan review process, copies shall be sent to the relevant county agencies applicable to preliminary plans in §181-12D of this chapter.

§ 181-10. Submission of sketch plan.

A. Any applicant for subdivision may submit a sketch plan to the Township Planning Commission for review prior to submission of a formal application. Submission of a sketch plan does not constitute subdivision application.

B. Sufficient copies of the sketch plan shall be submitted to the Zoning Officer for distribution to the Planning Commission and Township Engineer prior to the Planning Commission meeting at which the sketch plan is to be discussed.

C. The applicant shall consult the provisions of this chapter and other township ordinances related to environmental conservation or erosion, sedimentation and storm water control, prior to submission of the sketch plan, in order to ensure that the proposed subdivision will be compatible with these requirements.

§ 181-11. Review of sketch plan.

A. If a sketch plan has been submitted, the Planning Commission shall, at a meeting with the applicant, consider the suitability of the sketch plan for the subdivision of the land and its relationship to the harmonious extension of streets and utilities, arrangement and density of development and compatibility of the plan with the Comprehensive Plan for the township. Based on this meeting, the Planning Commission may submit its written comments to the applicant and the Board of Supervisors; provided, however, that the failure of the Planning Commission to submit comments in writing shall not be deemed to be an approval of any application or to vest any rights in the applicant.

B. The applicant may, but need not, request further review of the sketch plan by the Board of Supervisors. If further review is requested, the Board may consider the sketch plan; provided, however, that the Board is not required to review the sketch plan nor to submit comments to the applicant if the Board does review the sketch plan.

C. Nothing herein contained, nor the failure of the Planning Commission or the Board, or both, to proceed or act in accordance with this section shall be deemed to be a decision with respect to any subdivision or subsequent land development plan or to vest any rights in the applicant.

§ 181-12. Submission of preliminary subdivision plan.

A. All preliminary plans submitted pursuant to this chapter shall conform to the requirements of this chapter and shall, in addition, conform to such administrative regulations of the Board as may have been adopted by the Board and as shall be in effect and applicable to the submission at the time such submission is initiated. All applications shall be on the form promulgated by the township for the submission of subdivision plans.

B. Supporting plans. Applications for preliminary subdivision approval shall be accompanied by a preliminary subdivision plat and the following supplemental plans:

(1) Improvement Construction Plan.

(2) Natural Features Conservation Plan.

(3) Erosion, Sedimentation and Storm water Control Plan.

(4) Professional Traffic Survey and Plan, when required by §181-36C(1) of this chapter.

D. Official submission of a preliminary plan to the Zoning Officer shall consist of:

(1) One copy of the application for review of preliminary subdivision plan on the forms promul-

gated by the township and the Chester County Planning Commission for this purpose.

(2) A sufficient member of copies (as specified on the application form) of the preliminary plan and all supporting plans as listed herein and information to enable proper distribution and review, as required by the Board.

(3) Evidence of the submittal to, review by and, if appropriate, approval by all individuals or agencies whose review and/or of such plans is required.

(4) Payment of application fees and deposit of escrow for plan review cost.

D. Submission shall be made to the Zoning Officer. The Zoning Officer shall note the date of receipt of the submission. The submission shall not be deemed to be complete until all application forms, all preliminary subdivision plans and all required supporting plans and all required individual or agency reviews and/or approvals have been submitted to the Zoning Officer and application fees have been paid. The Zoning Officer shall make a preliminary review of the submission. If the Zoning Officer determines that the submission is defective or incomplete on its face, he shall notify the applicant, who may request the return of all submissions for the purpose of correction and resubmission. A request for the return of all submissions shall be in writing and shall be deemed to be a withdrawal of the application.

E. Upon receipt of a complete submission the Zoning Officer shall transmit the requisite number of copies of the plans and other required materials to the Planning Commission, the Township Engineer and to the following (any costs for review shall be paid by the applicant):

(1) Chester County Planning Commission.

(2) Chester County Health Department for review of matters relating to adequacy of the site to sustain on-site water and/or sewage disposal system.

(3) Chester County Soil and Water Conservation District, if required by law for review of matters relating to drainage and abatement of soil erosion.

(4) Governing body of any adjacent municipality, if the proposed subdivision includes land in that municipality or directly abuts its boundaries or if the proposed subdivision could, in the judgment of the Zoning Officer, unusually affect such adjacent municipality.

(5) Township or regional environmental advisory group(s).

(6) Such additional persons or agencies as may be required by township regulations.

F. The Zoning Officer shall schedule a date for presentation of the preliminary plan by the applicant at the next public meeting of the Planning Commission and notify the applicant of date thereof.

§ 181-13. Review of preliminary subdivision plan.

A. Township Planning Commission.

(1) After presentation of preliminary plans by the applicant at a public meeting, the Planning Commission shall review such plans and shall consider any recommendations made by an county agency, the Township Engineer and any other person, organization or agency who shall have submitted comments with respect to any such application.

(2) After such review, action shall be taken at a public meeting. The Zoning Officer shall send written notice of the action of the Planning Commission and the reasons therefore, citing specific sections of statues or ordinances relied upon, to the following:

(a) Board of Supervisors.

(b) Applicant.

(c) Governing body of any adjacent municipality, if a preliminary plan has been sent to such municipality under § 181-12E(4).

B. Board of Supervisors.

(1) When a written report on a preliminary plan has been officially submitted to the Board of Supervisors by the Planning Commission, such plan shall be placed on the agenda of the Board of Supervisors for review and action at a public meeting.

(2) In acting on the preliminary subdivision plan, the Board shall review the plan and the written comments of the Planning Commission, Township Engineer, County Planning Commission and all other reviewing agencies and comments from public hearings, if any, to determine conformity of the application to the standards of this chapter and any other applicable ordinance. The Board may specify conditions, changes, modifications or additions to the application which the Board deems necessary and may make a decision to grant preliminary approval subject to such conditions, changes, modifications or additions, citing appropriate ordinance provisions as prescribed in § 181-13B(5).

(3) For the purposes of Section 508 of Act 247,[5EN] the Township Planning Commissions is the body which first reviews any application. All applications for preliminary approval of a plan shall be acted upon by the Board of Supervisors and

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[5] Editor's Note: See 53 P.S. § 10101 et seq.

communicated to the application within 90 days following the dated of the regular meeting of the Planning Commission next following the dated the application is filed, provided that should the next regular meeting of the Planning Commission occur more than 30 days following the filing of the application, said ninety-day period shall be measured from the 30th day following the day the application is filed.

(4) The decision of the Board shall be in writing and shall be communicated to the applicant personally or mailed to the applicant not later than 15 days following the decision or by the end of said ninety-day period, whichever shall first occur. The form and content of the decision shall comply with applicable requirements of Act 247, Section 508.[6EN]

(5) Whenever the approval of a preliminary plan is subject to conditions, the written action of the Board as prescribed herein shall specify each condition of approval, citing relevant ordinance provisions in each case, and require the applicant's written agreement to the conditions. Where the applicant's written concurrence is not received within the time prescribed, the application shall be deemed to have been denied by the Board.

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[6] Editor's Note: See 53 P.S. § 10101 et seq.

§ 181-14. Submission of final subdivision plan.

A. The final plan shall conform to the terms of approval of the preliminary plan and to the administrative regulations adopted by the Board effective at the date of submission.

B. The Board may permit submission of the final plan in sections, pursuant to the terms of Section 508(4)(v) of Act 247.[7EN8N]

C. Supporting plans. Applications for final subdivision approval shall be accompanied by a final subdivision plat and the following supplemental plans:

(1) Improvement Construction Plan.

(2) Natural Features Conservation Plan.

(3) Erosion, Sedimentation and Storm water Control Plan.

(4) Professional Traffic Survey and Plan, when required by § 181-36C of this chapter.

D. Official submission of a final plan shall be made to the Zoning Officer and shall consist of:

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[7] Editor's Note: 53 P.S. § 10101 et seq.

[8]Editor's Note: Amended at time of adoption of Code (see Ch. 1, General Provisions, Art. I).

(1) One copy of the application for review of final subdivision plan on the forms promulgated by the township and the Chester County Planning Commission for this purpose.

(2) A sufficient number of copies (as specified on the application form) of the final plan and all supporting plans and information to enable proper distribution and review, as required by the Board.

(3) Evidence of the submittal to, review by and , if appropriate, approval by all individuals or agencies whose review and/or approval of such plans is required.

(4) Payment of required fees and required deposit of escrow for plan review cost.

E. Submission shall be made to the Zoning Officer. The Zoning Officer shall note the dated of receipt of the submission. The submission shall not be deemed to be complete until all application forms, all preliminary subdivision plans and all required supporting plans and all required individual or agency reviews and/or approvals have been submitted to the Zoning Officer and all application fees have been paid. The Zoning Officer shall make a preliminary review of the submission. If the Zoning Officer determines that the submission is defective or incomplete on its face, he shall notify the applicant, who may request the return of all submissions for the purpose of correction and resubmission. A request for the return of all

submissions shall be in writing and shall be deemed to be a withdrawal of the application.

F. Upon receipt of a complete submission, the Zoning Officer shall transmit the requisite number of copies of the plans and other required materials to the Planning Commission, the Township Engineer and to such additional persons or agencies as the Board of Supervisors shall determine.

G. The Zoning Officer shall schedule a date for presentation of the final plans by the applicant at the next open public meeting of the Planning Commission and notify the applicant of the date thereof.

H. Where the final plan is for a minor subdivision, the requisite number of copies shall be submitted to the County Planning Commission and other applicable agencies for their review as would be required of a preliminary plan pursuant to § 181-12E above.

§ 181-15. Review of final subdivision plan.

A. Township Planning Commission.

(1) After presentation of a final plan by the applicant at a public meeting, the Planning Commission shall review such final plan submitted and shall consider any recommendations of the Township Engineer and any other reviewing agency submitting comments.

(2) After such review, action on such plan shall be taken at a public meeting. The Zoning Officer shall send written notice of the action of the Planning Commission and the reasons therefore, citing specific sections of statutes or ordinances relied upon, to the following:

(a) Board of Supervisors.

(b) Applicant.

(c) Governing body of any adjacent municipality, if the proposed project includes land in that municipality or directly abuts its boundaries.

B. Board of Supervisors.

(1) When a written report on a final plan has been officially submitted to the Board of Supervisor by the Planning Commission, such plan shall be placed on the agenda of the Board of Supervisors for review.

(2) Upon receipt of the Planning Commission's recommendation and other supporting information, the Board shall, at one or more regular or special public meetings, review the final plan and shall, within the time limitations set forth hereinbelow, either approve or disapprove the plan. Notwithstanding the foregoing procedure, the Board shall render a decision on all final plans and communicate it to the applicant not later than 90 days following the dated of the regular meeting of the

Planning Commission next following the date the application is filed, provided that should the next regular meeting occurred more than 30 days following the filing of the application, said ninety-day period shall be measured from the 30th day following the day the application has been filed.

(3) The decision of the Board shall be in writing and shall be communicated to the applicant personally or mailed to him at his last known address not later than 15 days following the decision or by the end of the ninety-day period, whichever shall first occur. The form and content of the decision shall comply with and content of the decision shall comply with applicable requirements of Act 246, Section 508.[9EN]

(4) Copies of the final plan as finally approved, with the appropriate endorsement of the Board of Supervisors and the Township Engineer, shall be distributed as follows:

(a) One copy to the applicant.

(b) One copy to the Zoning Officer.

(c) One copy to the County Planning Commission.

(d) One copy to the County Health Department.

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[9]Editor's Note: See 53 P.S. § 10101 et seq.

(e) Three copies to the County Recorder of Deeds for recording.

(f) Two copies (one of which shall be on drafting film) to be retained in the township files, together with one copy of all supporting materials.

C. Every final plan approval shall be subject to these further conditions:

(1) The applicant shall execute a subdivision and land development agreement in accordance with Article VII hereof.

(2) The applicant shall provide a performance guaranty in accordance with Article VII hereof.

(3) The applicant shall, if requested, tender a deed of dedication to the township for such street, any and all easement for sanitary sewers, waterlines or storm sewers and improvements thereto, including street paving, sidewalks, shade trees, water mains, fire hydrants, sanitary and storm sewers, manholes, inlets, pumping stations and other appurtenances as shall be constructed as public improvements, after all streets, sidewalks, sewers and the like are completed and such completion is certified s satisfactory by the Township Engineering. Such deed shall be in form and substance satisfactory to the Board and Township Solicitor. The Board may require that the applicant supply a title insurance certificate from a

reputable company before any property is accepted for the township.

(4) Whenever the applicant is providing open space as part of the development, an easement in perpetuity restricting such open space against further subdivision development shall be executed between the applicant and the township or an organization acceptable to the township and shall accrue to the benefit of the township, lot purchasers in the subdivision and such other persons or organizations as the Board may deem appropriate.

(5) The applicant shall have applied for and received all required permits from agencies having jurisdiction over ancillary matters necessary to effect the subdivision such as Pennsylvania Departments of Transportation and Environmental Protection, Public Utility Commission and Chester County Health Department.

§181-16. Recording of final plan.

Within 90 days of the applicant's execution of the subdivision and land development agreement and performance guaranty, as provided in §§ 181-31 and 181-32, the final plan shall be recorded by the township in the office of the Recorder of Deeds of Chester County.

§ 181-17. Commencement of development.

No construction or land disturbance activities (not including soil testing, percolation testing, well drilling or similar testing, engineering or surveying activities) shall be commenced until the final plan has been recorded with the Recorder of Deeds of Chester County and until the requisite subdivision and land development agreements and performance guaranties have been accepted by the Board of Supervisors.

§ 181-18. Time limitations of plans.

The continuing validity of any approval of plans in accordance with this article shall be subject to those limitations established by Section 508(4) of Act 247, the Pennsylvania Municipalities Planning Code.[10EN]

§ 181-19. Plan modifications.

Material modifications of the approved plan, as determined by the Zoning Officer, shall be resubmitted and reprocessed in the same manner as the original plan. All site disturbance and construction activities shall cease pending approval of modified plans.

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[10] Editor's Note: See 53 P.S. § 10101 et seq.

APPENDIX C – OPINION OF JUDGE SIMPSON COMMONWEALTH COURT OF PENNSYLVANIA, DATED MARCH 10, 2004

John J. Koresko , V,	:	
and Bonnie J. Koresko,	:	
Appellants	:	
v.	:	No. 1627 C.D. 2003
	:	
Mark Farley, Seaton Ross,	:	Submitted: October 31, 2003
L.P., Township of	:	
Tredyffrin, Bryn Mawr	:	
Custom Home, Inc. and	:	
Ollie Bower	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE CHARLES P. MIRARCHI, JR., Senior Judge

OPINION BY JUDGE SIMPSON

FILED: March 10, 2004

In this case of first impression we are asked whether a prescriptive easement over land arises from encroaching tree roots and overhanging branches. The Court of Common Please of Chester County (trial court) concluded no such easement arose and granted judgment on the pleadings. We affirm.

John J. Koresko and Bonnie J. Koresko (Neighbors) purchased property in the Township of Tredyffrin (Township) in June 1996. Located near the one property line are several trees over 21 years in age, which hang over the boundary with the neighboring property (subdivided property). The impact of proposed development of the subdivided property on these trees is the basis of this litigation.

The subdivided property, containing a single residence, was owned by Ollie Bower. In 1999, Bower agreed to sell the property to M.J. Farley Development Co. Inc. That company submitted a subdivision plan seeking to divide the Bower property and to construct a second residence. The subdivision was approved by the Township supervisors, and the plan was recorded. Neighbors did not appeal subdivision approval.

The subdivision plan proposed the installation of a water line and the construction of a driveway near the boundary trees. Upon learning of the proposal, Neighbors sued in equity seeking injunctive relief and monetary damages.[1] In

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[1] The complaint named as defendants: Mark Farley, Ollie Bower, Seaton Ross, L.P., Bryn Mawr Custom Home, Inc., and the Township. Seaton Ross, L.P. was record owner of the subdivided property at the time Plaintiffs initiated their equity action. Bryn Mawr Custom Home, Inc. was a corporation which was a general partner in Seaton Ross, L.P. Plaintiffs aver these entities, and M.J. Farley Development Co. Inc. were sham corporations and were alter egos of defendant Mark Farley. Stephen D. Kaye/Diana S. Kaye and Robert W. Grupp/Jan M. Grupp the eventual buyers of the developed property, were later joined as defendants.

their complaint, Neighbors averred the driveway and trench would damage the root systems of the boundary trees. Ultimately, Neighbors filed an amended complaint containing several causes of action:

> Neighbors claim unreasonable interference with an easement. Specifically, they claim that, because their trees' roots and branches encroached on the subdivided property for over 21 years, a prescriptive easement existed for the tree roots and branches. They assert development of the property would unreasonably interfere with that easement; and
>
> Neighbors claim the subdivision was defective as a matter of law. In particular, the subdivision plan fails to display the existence of the boundary trees and provide notice of the possible existence of an easement, and fails to "list proposed material improvements, including installation of propane tanks in the setback areas." Reproduced Record (R.R.) at 731a. Neighbors also aver they were not given notice of subdivision approval; and
>
> Notice aver violations of subdivision approval arising from destruction of trees on the subdivided property, contrary to plans;[2] and

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[2] Neighbors also alleged various agents trespassed on their property and damaged several of the boundary trees. This count was ultimately discontinued to facilitate immediate review.

> Neighbors claim violations of the zoning ordinance arising from burying propane tanks in the designated setback area adjacent to their property; and
>
> Neighbors present an undeveloped claim that they were "deprived their property rights without compensation or due process of law...in violation of the Constitution of Pennsylvania and the United States of America and the applicable provisions of state and federal law." R.R. at 732a.

After considerable litigation, all defendants requested judgment on the pleadings. The trial court granted all judgments on the pleadings, holding, "Pennsylvania does not and will not recognize and easement for tree roots or overhanging branches." Trial Court Order, December 4, 2002. Further, noting that the Pennsylvania Municipalities Planning Code (MPC)[3] provides the exclusive means for challenging a subdivision, the trial court determined "the pleadings fail to state any cause for action based upon the subdivision approval." Trial Court Order, December 4, 2002.[4]

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[3] Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§10101-11202.

[4] Neighbors filed a motion requesting the disqualification of the Township's attorney due to an asserted conflict of interest. They argued that the law firm representing the Township in this equity action, Lamb, Windle, & McErlane (Law Firm), simultaneously represented Neighbor John Koresko in a collection action against defendant Mark Farley. Neighbors' motion to disqualify was denied as moot because no viable causes of action remained.

Neighbors appeal to this Court presenting several arguments which we address in revised order.[5]

In an appeal from a decision granting judgment on the pleadings, our review is limited to determining whether the trial court committed an error of law or abused its discretion. *Smith and McMaster, P.C. v. Newtown Borough,* 669 A.2d 452 (Pa.Cmwlth. 1995). When reviewing a trial court's decision to grant a motion for judgment on the pleadings, we may consider only the pleadings, accepting as true all well pleaded statements of fact, admissions and any documents properly attached to the pleadings presented by the party against whom the motion is filed. *Bradley v. Franklin*

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[5] As a preliminary matter, various defendants challenge Neighbors' two statements of matters complained of on appeal. The first, filed within the 14-day limit set by Pa.R.A.P. 1925(a), was five pages in length and raised 14 issues. Thereafter, an untimely amended statement expanded the specification of error relating to one issue. Various defendants argue the timeliness and length of Neighbors' amended 1925 statement preclude this Court's review.

Although the wisdom of including 14 issues in a 1925 statement is unclear, the Court declines to deem issues waived due to length, complexity or prolixity of an appellant's statement. *See Caln Nether Co. v. Bd. of Supervisors of Thornbury Township,* -___A.2d___ (33 C.D. 2003, filed January 8, 2004). Further, despite defendants' assertion that the untimely amended statement contains issues not raised in the original statement, our review demonstrates otherwise. Accordingly, this Court declines to hold any issues waived.

County Prison, 674 A.2d 363 (Pa. Cmwlth. 1996). We may sustain the trial court's grant of judgment on the pleadings only where the movant's right to succeed is certain and the case is so free from doubt that trial would be a fruitless exercise. *Id.*

I.

Neighbors assign as error the failure to recognize a perspective easement for encroaching tree roots and overhanging branches.

A prescriptive easement is a right to use another's property which is not inconsistent with the owner's rights and which is acquired by a use that is open, notorious, and uninterrupted for a period of twenty-one (21) years. *Waltimyer v. Smith*, 556 A.2d 912 (Pa. Super. 1989). A perspective easement, once acquired, may not be restricted unreasonably by the possessor of the land subject to the easement. *Palmer v. Soloe*, 601 A.2d 1250 (Pa. Super. 1992).

In *Jones v. Wagner*, 624 A.2d 166 (Pa.Super. 1993), the Superior Court held that overhanging tree branches are a trespass. A landowner has the right to compel removal of overhanging branches or engage in self-help. However, in discussing the appropriateness of self-help, the Superior Court mused in a note:

> The Restatement notes that a continuing trespass is not a trespass at all if the actor causing the trespass has obtained an easement by adverse possession. Restatement (Second) of Torts § 161, commented.

> *We cannot help but wonder whether the continued presence of encroaching tree branches, held openly, notoriously, hostilely, and continually for 21 years would create a prescriptive easement in the airspace which they hang.* If this would be the case, and we can find no Pennsylvania law which would indicate that a prescriptive easement is not available in this situation, a landowner who suffers actual harm for the first time during the tree owner's twenty-second year of hostile ownership, might very well be precluded from seeking a judicial, or even self-help, remedy. This result, while not entirely unforeseeable, is anomalous. However, if an action is available without a showing of damage, the landowner has no reason to complain if a neighbor's tree causes damage after the prescriptive period has run. *See contra, Pierce v. Casady*, 11 KanApp.2d 23, 711 P.2d 766 (1985) (holding that airspace is generally not subject to prescriptive rights).

Jones, 624 A.2d at 171, note 3 (emphasis added).

Citing this language from *Jones*, Neighbors argue their amended complaint sufficiently pleads a cause for action for unreasonable interference with an easement. In contrast, defendants assert Neighbors fail to sufficiently establish the existence of an easement. Specifically, they argue the encroachment of the tree roots and branches is not "open and notorious" conduct sufficient to create an easement.

We conclude Neighbors fail to state a claim for prescriptive easement as a matter of law, for several reasons. First, encroaching tree roots and limbs by themselves cannot notify a landowner of a claim to use the ground. Second, no Pennsylvania cases recognizes such easements. Third, well-reasoned authority from another jurisdiction persuades us that such easements should not be recognized. Finally, the potential of widespread uncertainty occasioned by such easements convinces us that they should not be recognized as a matter of public policy.

"The requirement that, to be adverse, a use must be open and notorious is for the protection of those against whom it is claimed to be adverse. It enables them to protect themselves against the effect of the use by preventing its continuance." Restatement of Property, Servitudes §458, commented. This requirement may be satisfied by a showing that either the landowner against whom the use is claimed has actual knowledge of the use or has had a reasonable opportunity to learn of its existence. *Id.*

Encroaching tree parts, by themselves, do not establish "open and notorious" use of the land. Neither roots below ground nor branches above ground fairly notify an owner of a claim for use at the surface. In the absence of additional circumstances, such as use of the ground for maintenance or collection of leaves or fruit, roots and branches alone do not alert an owner that his exclusive dominion of the ground is challenged. This conclusion is analogous to our Supreme Court's decision that the known presence of windows near a lot line does not crate a prescriptive easement for light and

air. *Maioriello v. Arlotta*, 364 Pa. 557, 73 A.2d 374 (1950). Indeed, such an easement cannot be created by prescription. *Id.*

Jones, upon which Neighbors rely, does not hold otherwise. The Court in *Jones* actually held that encroaching tree limbs are a trespass which a property owner may remove. *Dictum* in a footnote does not recognize an encroaching tree part prescriptive easement. Rather, the court concedes that no prior Pennsylvania case addresses the issue. In any event, the *dictum* is not precedential.

In *Pierce v. Casady*, 711 P.2d 766 (Kan.Ct.App. 1985) the Court of Appeals of Kansas held an easement by prescription cannot be acquired by overhanging tree branches. Writing for the Court, Chief Judge Abbott noted that defendants could not make the tree safe because the work would have to be done in the plaintiffs' airspace. *Id.* At 768. "Defendants have no right to go on plaintiffs' property to do that work for the same reasons plaintiffs have no right to go on defendants' property to trim or cut down the tree." *Id.* The Court concluded with a statement so clear, simple and true as to convince us of its wisdom:

> The result reached here will be distasteful to all who treasure trees. The philosophy of the law is simply that whenever neighbors cannot agree, the law will protect each owner's rights insofar as that is possible. Any other result would cause landowners to seek self-help or to litigate each time a piece of vegetation starts to overhand their prop-

> erty for fear of losing the use or partial use of their property as the vegetation grows.

Id. We agree with the reasoning and holding in *Pierce,* and we expressly adopt it in Pennsylvania.

Finally, we consider the consequences of the holding urged by Neighbors here. Judicial notice can be taken that trees growing over property boundaries and streets, around utility lines, and under sidewalks are common in Pennsylvania. A decision suggesting that the prolonged presence of these tree parts assures their unreduced continuation could cause uncertainty. Both the extent of the prescriptive easement and its effect on public and private use are problematic. As a matter of sound public policy, we decline to recognize a new estate which offers uncertainty and invites clarification through litigation.

For the reasons stated, we hold the trial court did not err when it granted judgment on the pleadings on the claim of unreasonable interference with an easement.[6]

II.

Neighbors next argue the trial court's grant of judgment on the pleadings was contrary to its earlier denial of a pre-

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[6] Neighbors contend that the trial court's consideration of evidentiary problems in establishing the extent of the easement was improper at the judgment on the pleadings stage. As we determine prescriptive easements for encroaching tree parts do not exist as a matter of law, we need not address this contention.

liminary objection in the nature of demurrer and thus violated the law of the case doctrine.

"The coordinate jurisdiction rule falls within the 'law of the case' doctrine which embodies the concept that a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of the same court in the earlier phases of the matter." *Nat'l Ry. Passenger Corp. v. Fowler,* 788 A.2d 1053, 1060 (Pa. Cmwlth. 2001). The "coordinate jurisdiction rule" recognizes that judges of coordinate jurisdiction sitting in the same case should not overrule each other's decisions. *Commonwealth v. Starr,* 541 Pa. 564, 664 A.2d 1326 (1995). It is premised on the policy of fostering finality in pre-trial proceedings in order to promote judicial economy and efficiency. *Id.*

In *DiAndrea v. Reliance Sav. & Loan Assoc.,* 456 A.2d 1066, 1070 (Pa. Super. 1983), the Superior Court considered whether judgment on the pleadings could be granted after an earlier denial of demurrer:

> The motion for judgment on the pleadings is one of several pretrial mechanisms to save the parties the expense of having to go to trial on the merits before examining the legal sufficiency of the case. Even after the denial of an earlier demurrer, it permits the trial judge to re-examine the legal sufficiency of the case in light of additional facts and legal theories developed as a result of new matter and reply thereto. Alternatively, in cases of first impression, the trial judge by denying the demurrer initially can permit the parties to fully develop the

> facts of the case before ruling on its legal sufficiency. In instances, like the instant case, where no further factual development occurs, the motion for judgment on the pleadings will permit the trial judge to consider any relevant legal authority decided in the interim period. Should the motion simply repeat the earlier arguments rejected in the demurrer, the trial judge may exercise his discretion to deny it.

We discern no reversible error. As discussed in *DiAndrea*, the coordinate jurisdiction rule does not preclude a judge's reevaluation of legal arguments at a later stage of litigation. That occurred here. More importantly, this Court is not bound by the trial court's decision on preliminary objections. We concluded no prescriptive easement arises for encroaching tree parts. The trial court's prudent delay in coming to the same conclusion is harmless.

III.

Neighbors next argue the trial court erred in determining the MPC is the exclusive method for challenging the subdivision. Neighbors' action regarding the subdivision asserts two groups of issues. The first group involves the validity of the subdivision itself. The second group involves the failure of the private defendants to comply with ordinances and comply with ordinances and conditions contained in the subdivision during the development of the property.

A. Challenges to the validity of the Subdivision

Neighbors argue proceedings under the MPC are not the exclusive method to object to the validity of the subdivision. In the amended complaint, Neighbors aver the subdivision is defective as a matter of law because of failure to notify neighboring property owners of the proceedings, failure to display the existence of the boundary trees and possible easement, and failure "list proposed material improvements, including installation of propane tanks in the setback areas." R.R. at 731a. Neighbors further argue that the subdivision failed to comply with Tredyffrin Township Subdivision and Land Development Ordinance (Ordinance) §181-43[7] by failing to protect the boundary trees.

Section 1001-A of the MPC, added by the Act of December 21, 2988, P.L. 1329, provides "[t]he procedures set forth in this article shall constitute the *exclusive mode for securing*

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[7] Ordinance § 181-43 states:

> Every subdivision or land development plan shall be designed to preserve and protect the natural features of the land, including...large trees standing alone or in groves...The burden shall be on the applicant to justify any material changes in the natural features of the land, including those features set forth above, by satisfactory proofs that subdivision or land development would not be feasible without such changes and that there are no practical alternatives to the material change.

review of any decision rendered pursuant to Article IX[8] or deemed to have been made under this act." 53 P.S. §§11001-A (emphasis added). Subdivision review is included in Article IX. *See* 53 P.S. § 10909.1(b)(2), added by the Act of December 21, 1988, P.L. 1329. Accordingly, the trial court did not err in holding that the MPC provided the exclusive vehicle for challenging the validity of the subdivision.

B. Equity Action Regarding Failure to Retain Trees

In addition to challenging the subdivision's validity, Neighbors claim a right to enforce certain provisions of the subdivision plan. In particular, they reference indications that trees on the subdivided property were to survive. They argue the plan details constitute a condition on subdivision approval which they may enforce in equity.

A governing body may impose on the approval of a subdivision reasonable and economically feasible conditions. *See Doran Inv. v. Muhlenberg Township*, 309 A.2d 450 (Pa.Cmwlth. 1973) *See also* 2 Robert S. Ryan, *Pennsylvania Zoning Law and Practice* § 11.2.13 (1998). Section 515.1[9] of

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[8] 53 P.S. §§10901-10916.2.

[9] Section 515.1 provides:

> (a) In addition to other remedies, the municipality may institute and maintain appropriate actions by law or in equity to restrain, correct or abate violations, to prevent unlawful construction, to recover damages and to prevent illegal occupancy of a building, structure or premises. The description by metes and bound in the

the MPC authorizes municipalities to sue in equity to enforce subdivision conditions. 53 P.S. §10515.1. A private landowner's right to sue lies not in the MPC, but under restrictive covenant.

Neighbors rely on *Doylestown Township v. Teeling,* 635 A.2d 657 (Pa.Cmwlth. 1993), in which a subdivision plan contained a note prohibiting further subdivision. Deeds to those purchasing lots contained the restriction, and the restriction was referenced in the title insurance policy of each grantee. Subsequently, a lot purchaser sought further subdivision. We determined the restriction noted on the recorded subdivision plan and the recorded deeds was a covenant running with the land which could be enforced in equity by a purchaser of a lot in the subdivision.

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instrument of transfer or other documents used in the process of selling or transferring shall not exempt the seller or transferor from such penalties or from the remedies herein provided.

(b) A municipality may refuse to issue any permit or grant any approval necessary to further improve or develop any real property which has been developed or which has resulted from a subdivision of real property in violation of any ordinance adopted pursuant to this article.

53 P.S. §10515.1.

Defendants assert Neighbors lack standing to enforce the subdivision conditions. "Standing" requires that the person bringing a cause of action be adversely affected by the matter in order to assure that the person is the appropriate party to bring the matter to judicial resolution. *Drummond v. University of Pennsylvania*, 651 A.2d 572 (Pa. Cmwlth. 1994). To establish standing, parties must show that they have an interest in the outcome of the litigation that is substantial, direct, and immediate. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975). An interest is substantial if there is a discernible adverse effect to an interest other than that of the general citizenry. *Id.* at 195, 346 A.2d at 282. It is direct if the petitioner can show harm to his interest. *Id.* It is immediate if it is not a remote consequence of the judgment. *Id.* at 197, 346 A.2d at 283.

The only relevant damage pled was that "[t]the public interest is served by granting this injunction because a) the public as a whole benefits from mature trees ...." R.R. at 733a. Neighbors pled no individualized harm occasioned by the removal of trees on the subdivided property. The only effect described is one Neighbors share with the general public. Such a generalized effect on the public good will not provide a litigant standing. *William Penn Parking*.

We reject Neighbors' suggestion that every detail on a subdivision plan creates a covenant which may be enforced by anyone. Neighbors fail to plead that they purchased a lot from the subdivided property or received a deed containing an enforceable undertaking, as in *Teeling*, or that they sustained any or that they sustained any special harm as re-

quired by *William Penn Parking*. Thus, Neighbors fail to plead facts to support their right to bring this part of their equity action.

C. Equity Seeking Enforcement of Setback Requirement

Neighbors plead defendants violated the Township zoning ordinance by burying propane tanks within the designated setback area adjacent to Neighbors' property. They argue the trial court erred in granting judgment on the pleadings on this clam because an equity action is an appropriate mechanism for a landowner to seek relief from a neighbor's violation of a zoning ordinance.

Although certain adjacent landowners may seek to enjoin zoning violations,[10] it is undisputed that the Township ultimately enforced the setback requirement. Thus, the offending propane tanks were moved from the setback area. Defendants argue this rendered Neighbors' enforcement claim moot.

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[10] Section 617 of the MPC, 53 P.S. §10617, establishes a cause of action for any owner of real property who shows that his or her property or person will be substantially affected by the violation of an ordinance. *Siegmond v. Duschak*, 714 A.2d 489 (Pa.Cmwlth. 1998). *See Frye v. City of Monongahela*, 526 Pa. 170, 584 A.2d 946 (1991) (adjacent property owner "as an aggrieved neighbor, had an independent right to seek relief from a zoning violation next door and that right could be asserted in an equity action."); *Penden v. Gambone Bros. Dev. Co.*, 798 A.2d 305 (Pa. Cmwlth. 2002) (adjacent landowners can sue in equity to compel compliance with zoning ordinance requiring a natural buffer).

"The general rule is that an actual case or controversy must exist at all stages of the judicial or administrative process or the matter will be dismissed as moot." *Bradway v. Cohen,* 642 A.2d 615 (Pa. Cmwlth. 1994).

Neighbors argue their claim is not moot because they sustained damages during tank installation for which they demand compensation. The only reference to this damage is contained in their demand for relief: "5. Order Defendants to remove the existing propane tanks ...and repair [the] damage to [the] trees and root systems and [Neighbors'] realty which they have already suffered as a result of construction to date." R.R. at 734a. Other than the oblique reference to damage to the trees and root systems and Neighbors' realty, no other damage from tank installation is identified.

The propane tanks were not installed on Neighbors' property; rather, they were installed on the subdivided property. If installation caused any damage to Neighbors' trees or roots, it was because the trees or roots were encroaching on the subdivision property. In Pennsylvania encroaching tree parts are a trespass which a landowner may remove. *See Jones.* Neighbors have no right to maintain the encroachment, and they have no right to damages to encroaching tree parts.

In summary, the claim to enjoin setback violation is moot. Neighbors have no surviving claim for damage to tree parts

encroaching on the subdivided property that precludes judgment on the pleadings. [11]

IV.

Neighbors next argue the trial court erred in granting judgment on Count V, which claims violation of their state and federal constitutional rights:

> 94. [Neighbors] have been deprived of their property rights without compensation or due process of law by action of Defendants Farley and

---

[11] Neighbors also aver their action regarding the propane tanks is not moot because they request attorney's fees. The claim recovery of attorneys fees as costs "consistent with applicable law, and because of the bad faith conduct of the Defendant Farley under 42 Pa.C.S. §2503 and 42 U.S.C. 1983 and 1985." R.R. at 1029. We disagree.

Section 2503 of the Judicial Code, 42 Pa.C.S. §2503(6)(7), provides that counsel fees may be awarded as a sanction against a party for dilatory, obdurate or vexatious conduct during the pendency of a matter. Conduct prior to or following the litigation cannot form a basis for and award of counsel fees under this statute. *White v. Redevelopment Auth. of McKeesport*, 451 A.2d 17 (Pa.Cmwlth. 1982). All allegations concerning bad faith conduct occurred prior to the initiation of suit. Accordingly, attorney's fees pursuant to Section 2503 are unavailable.

The request for attorney's fees under federal law also fails because, as described, the amended complaint does not aver the existence of the requisite property right.

> Bower in concert with Defendant Tredyffrin, its supervisors, employees, and agents, in violation of the Constitution of Pennsylvania and the United States of America and the applicable provisions of state and federal law.
>
> 95. [Neighbors] are entitled to equitable or legal relief in order to restore their property rights to the position existing prior to [the] grant of the Subdivision or to be compensated through restitution for an unlawful taking.

R.R. at 732.

Interpreting Count V to be a claim for civil conspiracy, defendants moved for judgment on the pleadings. R.R. at 1141a, 1156a. The Township argued such a claim was untenable because the asserted property right, a prescriptive easement for branches and roots, was not recognized by law.

Neighbors argue that defendants misunderstood Count V, in which they claim defendants violated their property rights without notice and due process. Neighbors contend that because the motion for judgment on the pleadings failed to recognize this theory and move for its dismissal, defendants waived the right to judgment on the pleadings for this claim.

Defendants sought judgment on the pleadings for Count V. Although they characterized the unlabeled count as a civil conspiracy claim, a challenge was raised to the underlying property right. The only applicable property right identified in the amended complaint is the easement for encroaching

roots and branches. As discussed, no such property right exists. Clearly, no claim arises for deprivation of an interest which the law does not protect; nor is any process due under those circumstances.

There is nothing about defendant's conduct that precludes their continued challenge to the underlying property right. Also, there is nothing about defendants' conduct to precluded judgment on the pleadings on Count V.

V.

Finally, Neighbors argue the trial court erred in denying their request to again amend the pleadings to provide greater specificity. Emphasizing that leave to amend should be liberally granted, Neighbor assert it was error to grant judgment on the pleadings terminating their cause of action at this early stage.

Except where an amendment is allowed as of course under Pa.R.C.P. No. 1028, or granted as of right under other provisions of the Rules of Civil Procedure, the allowance of an amendment under Pa.R.C.P. No. 1033 is completely subject to the discretion of the trial court. *General Machine Corp. v. Feldman*, 507 A.2d 831 (Pa.Super. 1986); *Spain v. Vicente*, 461 A.2d 833 (Pa. Super. 1983). We will not reverse the decision of the trial court in the absence of a clear abuse of discretion. *Stempler v. Frankford Trust Co.*, 529 A.2d 521 (Pa. Super. 1987).

Amendments are to be liberally permitted in order to allow full development of a party's theories and averments.

E.O.J., Inc. v. Tax Claim Bureau, 780 A.2d 814 (Pa. Cmwlth. 2001) However, amendments may be denied where there is prejudice or surprise to the opposing party. *Biglan v. Bigland*, 479 A.2d 1021 (Pa. Super. 1984). Also, an amendment is properly refused where it appears to be a reasonable possible that the amendment will be futile. *Lutz v. Springettsbury Township*, 667 A.2d 251 (Pa. Cmwlth. 1995); *Mace v. Senior Adult Activities Center of Montgomery County*, 423 A.2d 390 (Pa. Super. 1980).

Neighbors offer no additional facts to establish a claim against defendants. As noted by the trial court, "They do not suggest that any defect in the pleadings could be cured by amendment." Trial Court Opt. at 2. Under these circumstances, we discern no error in the trial court's denial of leave to again amend the complaint.

Accordingly, the order of the trial court is affirmed.[12]

ROBERT SIMPSON, Judge

[12] As the Court determines that Neighbors have no viable cause of action against the Township, we agree with the trial court that Neighbors' motion to disqualify the Township's counsel is moot.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

John J. Koresko, V, and Bonnie J. Koresko, Appellants	:	
v.	:	No. 1627 C.D. 2003
Mark Farley, Seaton Ross, L.P., Township of Tredyffrin, Bryn Mawr Custom Home, Inc. and Ollie Bower	:	

ORDER

AND NOW, this 10th day of March, 2004, the order of the Court of Common Please of Chester County is affirmed.

ROBERT SIMPSON, Judge.

APPENDIX D – STATEMENT OF MATTERS COMPLAINED OF ON APPEAL

John J. Koresko, V., et al.	:	
Appellants,	:	
v.	:	No. 1368 EDA 2003
Mark Farley, et al.	:	
Appellees.	:	

STATEMENT AND ISSUES COMPLAINED OF ON APPEAL FROM THE TRIAL COURT'S DECEMBER 4, 2002, DECEMBER 20, 2002 AND MARCH 27, 2003 ORDERS

Plaintiffs, by and through their undersigned counsel, hereby submit this Brief Statement and Issue Matters Complained of On Appeal From the Trial Court's Orders.

BRIEF STATEMENT

A copy of the December 4, 2002 Order, December 20, 2002 Order, and March 27, 2003 Order is attached hereto as Exhibit "A' , "B" and "C" respectively. In the attached orders, the trial court granted Defendants' Motions for Judgment on the Pleadings and denied Plaintiffs' Motion to disqualify the Township of Tredyffrin's counsel. The trial court erroneously granted Defendant's Motions for Judgment on the Pleadings. The trial court erroneously denied Plaintiffs' Motion to Disqualify the Township of Tredyffrin's counsel.

ISSUES TO BE RAISED ON APPEAL

1. THE COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS.

2. THE COURT ERRED IN APPLYING THE BURDEN OF PROOF IN GRANTING DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS.

a. The Court erred in ruling that in order to prevail on a Motion for Judgment on the Pleadings that Plaintiffs must assert full argument on issues not raised by Defendants in their Motion for Judgment on the Pleadings.

b. The Court erred in ruling that it was Plaintiffs' burden to prove that they could assert constitutional claims regarding notice and due process.

c. The Court erred in granting Defendants' Motion for Judgment on the Pleadings on all counts as Defendants' Motion did not address all of Plaintiffs' claims, including Plaintiffs' constitutional claims.

3. THE COURT ERRED IN APPLYING THE FACTUAL SUFFICIENCY IN GRANT DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADING.

a. The Court erred as a matter of law by granting Judgment on the Pleadings where facts were disputed.

b. The Court erred in granting Defendants' Motion for Judgment on the Pleadings where the Court stated that the

difficulty in proving certain facts seemed insurmountable, but did not state that such was impossible.

c. The Court erred in finding factual insufficiency in the Complaint wherein the Court did not grant Plaintiffs' argument, in the alternative, to amend the complaint.

4. THE COURT ERRED IN DETERMINING AS A MATTER OF LAW AN EASEMENT AND/OR ADVERSE POSSESSION CANNOT BE CREATED BY TREE ROOTS AND/OR BRANCHES.

a. The Court erred as a matter of law in after considering a demurrer in a preliminary objection, the Court considered the same issue raised in a later filed Motion for Judgment on the Pleadings and reversed its legal position without new facts and/or case law.

b. The Court erred in not applying the test as set forth by the Superior Court, in which the Court noted that it is quite possible to have a prescriptive easement on trees if all elements are present. *Jones v. Wagner,* 425 Pa. Super. 102, 624 A.2d 166 (1993).

5. THE COURT ERRED IN DETERMINING THAT PLAINTIFFS COULD NOT MAINTAIN A CAUSE OF ACTION ARISING FROM DEFENDANT TOWNSHIP OF TREDYFFINS'S FAILURE TO ENFORCE SUBDIVISION REQUIREMENTS.

6. THE COURT ERRED IN DETERMINING THAT PLAINTIFFS COULD NOT MAINTAIN A CAUSE OF ACTION ARISING FROM DEFENDANT TOWNSHIP OF

TREDYFFIN'S FAILURE TO ENFORCE TOWNSHIP ORDINANCES.

a. The Court erred as a matter of law in not allowing Plaintiffs to enforce ordinances and not adhering to *Frye Construction Inc. v. City of Monongahela,* 526 Pa. 170, 176-177, 584 A.2d 946, 948-949 (1991). ("deliberate violations of zoning ordinance have the effect of wrongfully infringing on the property rights of a neighbor, that neighbor is entitled to prompt vindication in a court of equity without regard to alternate administrative remedies that might be available. We have always so held and we continue to do so.") *Id.* at 176, 584 A.2d at 948.

b. The Court erred in not finding that Plaintiffs had a cause of action wherein the Defendants unlawfully installed propane tanks in the setback area of the adjacent properties, and even though the tanks were subsequently removed and reinstalled elsewhere pursuant to a valid permit, in that Plaintiffs are entitled to damages, including attorney's fees as a result of having to bring this action to enforce the ordinance and force the removal of the tanks.

c. The Court erred as a matter of law in not finding that the initial installation of underground propane tanks in the setback area on the property adjacent to Plaintiffs' property was done without a permit, was unlawful, and infringed on Plaintiffs' property rights.

d. The Court erred in not finding that despite the subsequent removal and reinstallation of the tanks outside of the setback area and pursuant to a properly issued permit, Plaintiffs have suffered damages as a result of the illegal installa

tion, including attorney's fees as a result of having to bring this action in order to force the removal and relocation of the tanks.

7. THE COURT ERRED IN DETERMINING THAT PLAINTIFFS COULD NOT MAINTAIN A CAUSE OF ACTION ARISING FROM DEFENDANT TOWNSHIP OF TREDYFFIN'S FAILURE TO ENFORCE PROVISIONS OF THE MUNICIPAL PLANNING CODE.

8. THE COURT ERRED IN RULING THAT THE EXCLUSIVE METHOD FOR CHALLENGING THE APPROVAL OF A SUBDIVISION IS PURSUANT TO THE MUNICIPAL PLANNING CODE.

9. THE COURT ERRED AS A MATTER OF LAW IN NOT RULING THAT AN ADJACENT PROPERTY OWNER HAS THE RIGHT TO PURSUE AN ACTION IN EQUITY TO OBJECT TO A SUBDIVISION PLAN THAT INFRINGES ON THE OWNER'S PROPERTY INTERESTS.

10. THE COURT ERRED AS A MATTER OF LAW IN NOT RULING THAT AN ADJACENT PROPERTY OWNER HAS A RIGHT TO PURSUE AN ACTION IN EQUITY TO SEEK COURT INTERVENTION TO FORCE COMPLIANCE WITH A SUBDIVISION PLAN.

11. THE COURT ERRED IN RULING THAT DEFENDANTS HAD NOT VIOLATED PLAINTIFFS' RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

a. The Court erred in holding that the Complaint was insufficient to state a cause of action for violation of Plaintiffs' rights under the United States Constitution.

b. The Court erred in holding that the Complaint was insufficient to state a cause of action under the Pennsylvania Constitution.

c. The Court erred in holding that Plaintiffs' 14th Amendment rights to due process and compensation for unlawful taking had not been violated although Defendants Farley, Seaton Ross, and Bower could not have acted to destroy Plaintiff's property absent the approval of subdivision and building permits by Defendant Tredyffrin Township.

d. The Court erred in not finding that the Tredyffrin Township zoning and subdivision ordinances are unconstitutional under the 14th Amendment of the United States Constitution because they do not require any notice to adjoining landowners of the pendency of a subdivision application.

12. THE COURT ERRED IN RULING THAT DEFENDANTS HAD NOT VIOLATED PLAINTIFFS' RIGHTS UNDER THE CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA.

13. THE COURT ERRED IN NOT ALLOWING PLAINTIFFS TO AMEND THE COMPLAINT.

14. THE COURT ERRED IN NOT DISQUALIFYING THE LAMB FIRM, WHEREIN THE LAMB FIRM HAD REPRESENTED PLAINTIFFS IN A RELATED MATTER.

Respectfully submitted,

_____

John J. Koresko, V., Esquire (I.D. No.: 42795)
Virginia I. Miller, Esquire (I.D. No.: 85361)

Attorneys for Plaintiff

DATED: May 20, 2003

CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of Docketing Statement, on the following parties by U.S. First Class Mail, postage prepaid at the following addresses:

Scott E. Yaw, Esquire
Robert W. Lentz, Esquire
Lentz, Cantor. & Massey, Ltd.
Chester County Commons
20 Mystic Lane
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Attorney for Defendants Mark Farley and Seaton Ross, L.P.

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Attorney for Township of Tredyffrin

Henry Portner, Esquire
Henry Portner & Associates
P.O. Box 200
125 E. Lancaster Avenue
Paoli, PA 19301-0200
Attorney for Defendant Ollie Bower

_____

VIRGINIA I. MILLER, ESQUIRE
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DATED: May 20, 2003

KORESKO & ASSOCIATES, P.C.
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Attorneys for Plaintiff

IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA CIVIL ACTION-LAW

John J. Koresko, V., et al.	:	
Plaintiffs,	:	
v.	:	NO. 01-05343
Mark Farley, et al.	:	
Defendants.	:	

NOTICE OF APPEAL

Notice is hereby given that Plaintiffs John J. Koresko, V and Bonnie J. Koresko, hereby appeal to the Superior Court of Pennsylvania for the Orders entered in this matter on March 28, 2003, December 18, 2002 and December 4, 2002 and related matters. The Orders have been docketed as evidenced by the attached copy of the docket entry.

Dated: April 25, 2003

By:_____

Virginia I. Miller (I.D. No. 85361)
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IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA CIVIL ACTION-LAW

John J. Koresko, V., et al.	:	
Plaintiffs,	:	
v.	:	NO. 01-05343
Mark Farley, et al.	:	
Defendants.	:	

TRANSCRIPT CERTIFICATION

I, Virginia I. Miller, Esquire, certify that there are not transcripts of the proceedings in this matter before the Honorable Robert J. Shenkin relating to the Orders of March 28, 2003, December 18, 2002 and December 4, 2002 and that no transcription need be completed for purposed of this appeal.

Dated: April 25, 2003

By:_____

Virginia I. Miller (I.D. No. 85361)
ANDERSON KILL & OLICK, P.C.
1600 Market Street, Suite 2500
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(215) 568-4202

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Paoli, PA 19301-0200
Attorney for Defendant Ollie Bower

_____

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Philadelphia, PA 19103
(215) 568-4202

DATED: April 25, 2003

APPENDIX E – PETITION TO THE SUPREME COURT OF PENNSYLVANIA FOR ALLOWANCE OF APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT

ISSUED MARCH 10, 2004,

JOHN J. KORESKO, V., AND BONNIE J. KORESKO,

Appellants

v.

MARK FARLEY, SEATON ROSS, L.P., TOWNSHIP OF TREDYFFRIN, BRYN MAWR CUSTOM HOME, INC., OLLIE BOWER

NO. 1627 C.D. 2003

OPINIONS DELIVERED IN THE COURTS BELOW

The Opinion of the Commonwealth Court is reported unofficially at *Koresko v. Farley,* _____ Pa. Commw. LEXIS 203, 2003 WL 23318662 (March 10, 2004).

The opinion of the Court of Common Pleas of Chester County is not reported, Copies of both Opinions are attached as Appendix A.

TEXT OF THE ORDERS IN QUESTION

Because of their length, the three orders of the Court of Common Pleas of Chester County under appeal are attached as Appendix B.

QUESTIONS PRESENTED FOR REVIEW

1. Did the unrestricted growth of branches and roots from Neighbors' boundary trees onto an adjoining parcel for over 21 years create an easement of other legally protected property interest for the Neighbors, which neither Tredyffrin Township, a Developer, nor other parties had the right to destroy in the course of subdivision, construction and subsequent use?

2. Is the Tredyffrin Township subdivision ordinance unconstitutional as written and applied because it does not require prior notice to adjoining landowners of all subdivisions and ensuing construction, especially those that could interfere with Neighbors' rights to enjoy their boundary trees?

3. Did Tredyffrin Township and other state actors violate the constitutional rights of the Neighbors or commit a tort by failing to adhere to or enforce subdivision plan provisions and Township Ordinances forbidding unauthorized removal or construction within the dripline of any tree?

4. Do adjoining landowners have standing to sue when they (a) received no prior notice of subdivision, (b) harmed by subsequent construction allowed by or in violation of the subdivision plan, and (c) demand compliance with Township ordinances enacted to protect of their health and property?

STATEMENT OF THE CASE

John Koresko and bonnie Koresko (referred to herein as "Neighbors") appeal from the orders of the lower courts that allow them no means to receive just compensation or protect their property, ancient trees, roots, and branches, from the damage caused by development activity on adjoining real estate. Neighbors own a house situated on a 1.3 acre parcel in a neighborhood in Tredyffin Township, Pennsylvania. The defendants, other than Tredyffrin Township, have or had during times relevant to the Complaint an ownership interest in an adjoining parcel. Both the parcels are in highly wooded area zoned for single-family residential use. They share a boundary line approximately 200 feet long. The parcels are separated by a row of ancient, tall trees whose trunks are on Neighbors parcels but very close to that boundary line. Most are over 75 feet tall, and have an age of 75 to 125 years. Both branches and roots of the Neighbors' trees have grown naturally and unabated, 20 feet or more across the boundary onto the adjacent property.

Severally months after a subdivision plan had been approved for the adjoining parcel, Neighbors discovered that the Developer was about to begin construction of houses. Neighbors got no notice of the pending Subdivision and the Tredyffrin Township ordinances required none. Neighbors contacted the Township and Vincent Pompo, Esquire of Lamb, Windle & McErlane, PC (now Lamb McErlane, P.C. and referred to herein as the "Lamb Firm"). Mr. Pompo is a partner of William Lamb, Esquire, and the two of them have acted as Solicitor for Tredyffrin Township for many years.

Neighbors asked Mr. Pompo and the Township to refrain from issuing building permits. That request was denied.

In a letter, Pompo told the Neighbors that they had no rights to stop the construction. The Neighbors were left with no option but to pursue litigation against Tredyffrin Township, the developer Mark Farley and his controlled entities [Bryn Mawr Custom Home, Inc. and Seaton Ross, L.P.] (the "Developer"), Ollie Bower (the former owner) and Mr. and Mrs. Stephen Kay and Mr. and Mrs. Robert Grupp (the new owners of houses built on the site). However, the damage had already been done.

While all of this was going on, the Developer was being sued by John Koresko's law firm for an old debt [legal fees Developer refused to pay in connection with Developer's bankruptcy proceedings]. Mr. Koresko is the sole owner of the firm. See *Koresko & Associates, P.C. v. Farley,* 826 6, 7 (Pa. Super. 2003). Mr. Koresko employed Mr. Lamb and the Lamb Firm as local counsel for this action in Chester County, and prior to any construction, began *execution against the same adjoining parcel.* Joel Frank, Esquire, of the Lamb Firm entered his appearance for Mr. Koresko. Judge Robert Shenkin presided over that matter and stayed execution upon the Developer's posting of a $50,000 bond. Mr. Koresko retained the Lamb Firm as additional counsel since Koresko's other attorney, Virginia Miller, Esquire, had been notified of her assignment to the Middle East in Support of U.S. military operations in Afghanistan. Ms. Miller is a Major in the Pennsylvania Air National Guard Special Operations wing stationed in Middletown, PA.

Prior to filing suit against the Township, Mr. Koresko and Attorney Miller had a conference with Mr. Lamb to discuss the lawsuit. Mr. Koresko was aware of Lamb' s position as Township Solicitor and the possible conflict with Lamb's existing representation of Mr. Koresko's interests in one case and the Township's in another, especially when the same parcel of land and defendant (the Developer) were involved in both. Mr. Lamb assured Mr. Koresko that the Township would remain "neutral" in the second litigation, since ultimately the Developer and Owners would ultimately be liable for any damages caused by the construction. Mr. Koresko allowed Mr. Lamb to appear for the Township only on the basis of that promise.

Neighbors then filed a complaint in the Court of Common Pleas of Chester County (Shenkin J.), against the named Defendants: Tredyffrin Township, the Developer, Ollie Bower, the Kayes and the Grupps, seeking various forms of equitable relief and /or damages. The pleadings reflected causes of action for trespass, interference with easement, violations of constitutional rights to due process, unlawful taking, violations of the subdivision ordinance, relief under 42 USC§1983 et seq. and other appropriate equitable relief to prevent further damage, obtain restitution, and to remove the offending uses.

About a year into the litigation, Mr. Lamb apparently changed his mind about neutrality. He demanded that Neighbors discontinue their action against Township or face a "Dragonetti" action for bad faith and malicious prosecution. Given Lamb's abdication of neutrality, and the unmistakably adverse action against his clients, Koresko asked

Lamb to resign from his representation of the Township in accordance with the Rules of Professional Conduct. Mr. Lamb refused and instead caused the Lamb Firm to terminate its representation of Mr. Koresko's interests in the other case against the Developer. [Mr. Koresko eventually prevailed in that case, despite having to handle much of the work. *Koresko & Associates, P.C. v. Farley,* 2003 Pa. Super. 188, 826 A.2d 6 (2003).]

The Lamb Firm then moved for judgment on the pleadings. Other Defendants followed Lamb's lead. Neighbors responded by arguing that Judge Shenkin could not grant that motion because the Complaint stated valid casuses of action and he was bound to construe all facts and inferences in favor of Plaintiffs. In the alternative, Neighbors requested leave to amend the Complaint.

Neighbors also moved the Common Pleas court to disqualify the Lamb Firm. Mr. Koresko, a member of the Bar, submitted an affidavit in support of disqualification, stating he had discussed with Attorneys Lamb and Frank sensitive matters related to the litigation against the Township which would not have been revealed had Koresko known they would become adversaries. Judge Shenkin *never conducted an evidentiary hearing, and never demanded or received from the Lamb Firm any written fee agreement.* Judge Shenkin did receive an affidavit from Lamb's partner, Joel Franks, Esquire, that a fee agreement existed which notified Koresko that he would be dropped as a client if a conflict with the Township arose. Neighbors pointed out in their memoranda to the courts below that *Mr. Frank would have needed clairvoyance* to include such a clause in the mystery

ously absent fee agreement, since the conflict between the two litigation matters did not arise until many months *after* the Lamb Firm accepted representation of Koresko.

Neighbors also moved for partial judgment after the parties took several depositions. The Neighbors offered by affidavit the expert witness report of William Graham, a certified arborist from the University of Pennsylvania. Inresponse to the Neighbors' motion for partial summary judgment, the defendants offered no evidence to counter the Neighbors' evidence as to age of the trees, the growth rate of roots and branches, the locations of roots and branches, the approximate time the roots and branches were growing on the adjoining property, and the amount of damages for removal and replacement of the trees. The arborist concluded that the subject branches and roots crossed the boundary line over between 50 and 75 years ago and continued to grow on the adjacent parcel unabated. In her deposition, the Former Owner concurred that the trees were "like a natural fence" and she never objected to the encroachment of the tree parts. The Township admitted the Neighbors got no notice of the Subdivision from the Township, the Developer or Former Owner. The Township Subdivision Ordinance requires no notice to an adjoining landowner, and in the words of Township Manager Joseph Janasek, "We never give notice." In his deposition, Janasek confessed the Township's reliance on Lamb and Pompo for expert counsel on zoning and subdivision matters. Janasek confirmed that the Solicitors had instructed the Township that no such notices were required. Janasek signed the permits for the construction as well as use and occupancy certificates. Inspectors

from Tredyffrin Township visited the site several times during construction. There is no question the Developer cut in a road and utility ditch within the dripline of the Neighbors' trees and severed many roots both above and below the surface. Photographs produced at depositions confirmed this. The arborist's expert report stated unequivocally that the roots amputations and general disturbance of the dripline were fatal to the trees. No party questioned the clear visibility of the tall trees and that some of the roots were on the surface of the properties. The arborist opined that the roots grew on or within 18 inches of the surface.

Although Neighbors had amended their compliant only once before, Judge Shenkin refused to grant Neighbors' request to allow amendment of the complaint to cure any defects in pleading. The judge concluded, without asking for any evidence on the matter, that Neighbors could allege no facts to state a cause of action on account of the damage to the trees. He then issued three orders to dispose of the matters. Order 1 granted Defendant's motions for judgment on the pleadings. In a footnote, the judge called the motion for summary judgment, although the court offered to make a transfer to the law side of the court if money damages were sought for a small part of one remaining count. Neighbors asked Judge Shenkin to certify Orders 1 and 2 for appeal, the judge refused. Left with only a trespass count against the Developer and the Former and Present Owners (limited, according to court, to the damages for unauthorized removal of two smaller trees), the Neighbors voluntarily dismissed it, enabling the trial court enter Order 3 as a final judgment and facilitate appeal.

The Neighbors appealed all three Orders to the Superior Court. On the motion of Mr. Pompo, who vigilantly represented the Township, the Superior Court transferred the appeal to the Commonwealth Court. The Commonwealth Court called this matter "a case of first impression" but affirmed Judge Shenkin's decision that an easement cannot arise from encroaching tree roots or branches. Further, the Court held that Neighbors had no standing to sue. The Commonwealth Court found Judge Shenkin's refusal to allow amendment within the bounds of his discretion. The Court stated in the last footnote to its opinion that the lower court was correct in not disqualifying the Lamb Firm, since the causes of action alleged by Neighbors were ultimately decided against them,; and therefore, the disqualification issue raised below prior to the decision on the merits was moot.

During the pendency of Neighbors' appeal of Orders 1, 2, and 3, Attorney Lamb received a political appointment to this Honorable Court. During his short time on this Bench, one of the Justice Lamb's law clerks was Judge Shenkins's daughter.

The trees are dying. The Developer has his money. The Township did make one noble gesture: it responded to a claim in the Complaint, prior to Judge Shenkins' decisions, and ordered the Developer to move underground propane tanks that had been buried illegally. The courts below said that this "victory" entitled Neighbors to nothing from the Township or the Defendants. Although the Commonwealth Court alluded in its opinion to "other remedies," it appears that all applicable statutes of limitations have expired. The

Neighbors have no apparent remedy in the event the lower courts are not reversed.

Having completed his service on this Honorable Court, former Justice Lamb now practices law with Solicitor Pompo and Mr. Frank in the comfortable, familiar surroundings of Chester County. The Tredyffrin ordinances and the attitude of the Township's administrators remain unchanged on the points at issue before this Court.

REASONS FOR ALLOWANCE OF APPEAL SUMMARY

In this case of first impression, Appellants John and Bonnie Koresko (referred to herein as " Neighbors") ask this Court to rule that they have fundament rights to protect their ancient trees, roots, and branches from damage caused by development activity on adjoining residential real estate. Although the Amended Complaint stated clearly that Neighbors assertion or "other property interests" in an adjoining parcel, the courts below considered only the theory of easement by prescription. The courts concluded, contrary to the Restatement of Property, the tree branches and roots, living organisms, are entitled to less protection than other categories of encroachments, living or inanimate.

In the Commonwealth Court, the Neighbors argued alternatively and specifically the possibility that the nature of their interest was that of irrevocable license, but the court made no mention of why the holding of *The Morning Call, Inc. v. Bell Atlantic- Pennsylvania, Inc.,* 2000 Pa. Super. 294. 761 A.2d 139 (2000) should not apply. That case recognized an equitable property right, "irrevocable license," for en

croachments and uses of many decades which do not quite fit the definition of easement. While claiming that they "would not create a new estate," the judges below actually carved out a lesser place in the law for tree branches and roots, ignoring the general jurisprudence on easement applied for decades by this Court and the Superior Court. *See Lewkowicz v. Blumish,* 442 Pa. 369. 275 A.2d 69 (1971); *Brennan v. Manchester Crossings, Inc.,* 708 A.2d 815 (Pa.Super.1998); *Jones v. Wagner,* 425 Pa. Super. 102, 624 A.2d 166, alloc.denied , 536 Pa. 626, 637 A.2d 286 (1993). Finally, the Commonwealth Court adopted a decision of a Kansas intermediate appellate court as the law of Pennsylvania, apparently overlooking that the Kansas case rested on a lack of Kansas precedent and ultimately applied (improperly) the law of nuisance instead of shared use.

If this Court accepts Neighbors' logic, then it must also find as a matter of law that Tredyffrin Township (by its supervisors, manager, inspectors, solicitor), the Developer, and Prior Owner acted individually or in a conspiracy under color of state law to deprive the Neighbors, without due process of law, of their constitutionally protected rights to the life and enjoyment of their ancient boundary trees. All subdivision ordinances in this Commonwealth should compel notice to adjoining landowners, since they have to live with the results and are most likely to suffer harm from wrongful conduct. Citizens have the right to expect that their elected officials will enforce the laws equally, especially tree protection laws, even against Developers. This Court should reverse the Commonwealth Court and hold that self-help remedies are not appropriate in legal landscape of the

21st century, regardless of the ancient common law. Our common sense should not be crushed under the weight of *stare decisis.*

I. THE LOWER COURT ERRED IN HOLDING THAT THE NEIGHBORS HAD NO PROPERTY INTEREST ARISING FROM THE TREE LIMBS AND BRANCHES THAT GREW UPON AN ADJOINING PARCEL FOR LONGER THAN 21 YEARS.

A. The general law of easements and licenses refers to use of another's land, not the item involved in the use.

Arcane and complex historical rules define the differing degrees by which one can acquire the right to use another's land. *The Morning Call, Inc. v. Bell Atlantic-Pennsylvania, Inc.*, 2000 Pa. Super. 294, 761 A.2d 139 (2000), Such classifications are generally called "servitudes," and include covenants, easements, licenses and profits. Id., citing Jesse Dukeminer and James E. Krier, *Property,* at 787-88 (3d Ed. 1993). Powell and Boyer, SURVEY OF THE LAW OF PROPERTY, at 366-426 (West 1970). Distinct rules distinguish each interest from the other., *id.*, and Depending on how the transaction is classified different legal incidents attach to the relationship. Cornelius J. Moynihan, *Introduction to the Law of Real Property* 68 (1962). In the present case, the Neighbors assert that the doctrines of easement or license control.

An easement has been defined as "a liberty, privilege or advantage which one may have in the lands of another with

out profit... " Coffin v. Old Orchard Dev. Corp., 408 Pa. 487, 494, 186 A.2d 906, 910 (1962), and generally contemplates a long-term right of use. An easement may be created 1) expressly; 2) by prescription; 3) by necessity; or 4) implication. *Morning Call, supra; National Christian Conference Center v. Schuylkill Township,* 597 A.2d 248, 250 (Pa.Cmwlth.1991). A prescriptive easement is acquired by analogy to the acquisition of title to land through adverse possession for twenty-one years. Bodman v. Bodman, 456 Pa. 412, 414, 321 a.2d 910, 912 (1974); 1 *Ladner on Conveyancing in Pennsylvania,* § 11.02 (c) (4th Ed. 1979). Such a "prescriptive right is based upon the ***presumption of a lost grant."*** ***Wasmpler v. Shenk,*** 404 Pa. 395. 398, 172 A.2d 313, 315 (1961) An easement by prescription is created by adverse, open continuous, notorious and uninterrupted use of land for the prescriptive period-in Pennsylvania, that period is for 21 years. *POA Company v. Findlay Township Zoning Hearing Board* , 551 Pa. 689, 713 A.2d 70 n. 13 (1998, (citing *Lewkowicz v. Blumish,* 442 Pa. 369, 371, 275 A.2d 69, 70 (1971)); ***Shinn v. Rosenberger,*** 347 Pa. 504, 507, 32 A.2d 747, 748 (1943). If use is permissive a prescriptive easement cannot arise, no matte how long the use continues, and the passing of time under such circumstances does not raise the presumption of a grant. *Shinn, supra.*

The four elements for prescriptive easement tare often defined in terms of adverse possession because they are just degrees of the same principle. Broadly speaking, adverse use it is not equivalent to occupancy. Reed v. Wolyniec, 323 Pa. Super. 550, 471 A.2d 80 (1983 ;) Burns v. Mitchell, 252 Pa. Super. 257, 381 A.2d 487 (1977) (en banc) (plaintiff who had

occupied defendant's land and maintained lawn up to fence for more than 21 years established title by adverse possession). The words "visible and notorious possession, " as applied to the adverse holding of land by a party without color of title, mean that the claim of ownership must be evidenced by conduct sufficient to place a reasonable person on notice that his or her land is being used by the claimant as his own. *Sterner v. Freed*, 391 Pa. Super. 254, 570 A.2d 1079 (1990) (plaintiff's use of defendant's driveway notorious for 26 year period and therefore sufficient to establish prescriptive **easement).** In *Reed*, the appellees, Robert and Audrey Reed, obtained title by adverse possession to a lot adjacent to their residence. The Reeds had maintained the lot by cutting the lawn and by planting and maintaining thereon various shrubbery and flowering plants, even though other person occasionally passed unobserved over the are in question. If the owners do not expressly objected to exercise of use over the land in question, and no special relationship exists between the parties, a sufficiently notorious use will be presumed to be enough to alert the owner of the land to an adverse claim. *Waltimyer v. Smith,* 383 Pa. Super. 291, 556 A.2d 912, 914 (1989). The word "hostile", as an element of prescriptive easement does not mean "ill will" or "hostility", abut implies an assertion of ownership rights adverse to that of the true owner and all others. *Schlagel v. Lombardi,* 337 Pa. Super. 83, 486 A.2d 491 (1984) (citing *Vlachos v. Witherow,* 383 Pa. 174, 118 A.2d 174 (1995)); see also *Jones v. Porter,* 3 P & W. 132 (1831) (party who attempted to establish adverse possession was not required to show that he had entered the land and held it in direct hostility to other claimants). Furthermore, if all of the elements of adverse possession are

established, the element of hostility is implied). *Schlagel, supra.* Finally, in order for adverse possession to ripen into title, it is necessary that such possession had been continuous and uninterrupted for the full statutory period. *Tioga Coal, supra; Elias v. Scott,* 164 Pa. Super. 329, 64 A.2d 508 (1949). In this Commonwealth, as in most jurisdictions, the statutory period is twenty-one years.

While an easement is an interest in property, a license is a mere personal or revocable privilege to perform an act or series of acts on the land of another, which conveys no estate. ***Baldwin v. Taylor,*** 166 Pa. 507, 31 A. 250 (18955). An easement is usually written, but a license is usually created orally. ***Id.*** A pure license is revocable at the will of the licensor, ***Stein v. Bell Te. Co,*** 301 Pa. 107, 151 A. 690 (1930), and is automatically revoked by the sale of the burdened property. ***Thompson v. Commonwealth Dept. of Highways*** 214 Pa. Super.329, 257 A.2d 639, 642 (Pa.Super.1969 (citing ***Puleo v. Bearoff*** 376 Pa. 489, 103 A.2d 759 (1954). But, a license may become irrevocable under the rules of estoppel and in those circumstances it is similar to an easement. "When the owner of land, with full knowledge of the facts, tacitly permits another repeatedly to do acts upon the land, a license may be implied from his failure to object." ***Turnway Corp. v. Soffer***. 461 Pa. 447. 336 A.2d 871, 878 (1975 (quoting ***Leininger v. Goodman,*** 277 Pa. 75, 77-78, 120 A. 772, 773 (1923)).

The equitable doctrine of irrevocable license has existed in this Commonwealth for more than 135 years. It did not exist at common law. One branch of this doctrine contemplates use followed by the expenditure of money on the

faith of it, resulting in an irrevocable binding contract. ***Huff v. McCauley,*** 53 Pa. 206. 208 (1866); ***Kovach v. General Telephone Co.,*** 340 Pa. Super. 144, 489 A.2d 883, 885 (Pa. Super.1985). An irrevocable license, while not strictly an easement, is in the nature of one. It is really a permission, express or implied, to use the property of another in a particular manner, or for a particular purpose. Where this permission has led the party to whom it has been given, to treat his own property in a way in which he would not otherwise have treated it... it cannot be recalled to his detriment. ***Harkins v. Zamicheili,*** 266 Pa. Super. 401, 405 A.2d 495. 498 (Pa. Super. 1979) (quoting ***Pierce v. Clelland,*** 133 Pa. 189, 19 A. 352 (1890)). Thus, the irrevocable license gives "absolute rights, and protects the licensee in the enjoyment of those rights." ***Cole v. Ellwood,*** 216 Pa. 283, 289, 65 A. 678 680 (1907). Additionally, "successors-in title [to the servient tenement] take subject to an irrevocable license if they had notice of the license before the purchase." ***Kovach, supra*** (quoting ***Harkins, supra*** 405 A.2d at 498). Some courts refer to this right as equitable easement. Powell and Boyer, at 366, 420.

A prime example of the slight distinction between easement by prescription and irrevocable license is found in the *Morning Call, Inc. v. Bell Atlantic-Pennsylvania, Inc.,* 2000 Pa. Super.294. 761 A.2d 139 (2000). There, Bell Atlantic had installed a service box on the side of Morning Call's building. It remained there openly and continuously for 72 years. Bell maintained it. There was no evidence, however, that the use was originally permissive. The trail court held that Bell had acquired an easement by prescription. The

Superior Court held in Bell's favor, but reclassified the nature of the rights. Because the use was permissive, an easement could not arise. However, because of the open, long-term use of the property, Bell satisfied the elements for grant for irrevocable license.

B. The Neighbors have alleged and introduced proof sufficient to characterize their interest as that of an easement or irrevocable license.

All Neighbors needed to allege, which they did, was that their adverse use continued in an open and "hostile" manner for a continuous period in excess of 21 years. The Amended Complaint asserts the following about the growth of the tree branches and roots onto the adjoining property:

Prior to the subdivision, several mature trees existed along said boundary ("boundary trees"), over 40 feet in height, the trunks of which grow on Koresko's property, and the roots of which are beneath the surface on the 1185 Property. (Am. Compl. ¶ 20). Prior to the subdivision, the boundary trees, the boundary trees' roots, and the boundary trees' branches had been growing onto the 1185 property for at least 21 years."(Am. Compl. ¶ 21). The branches and root systems of the trees have grown in an open and notorious manner for the benefit of the Koresko property, and in so doing, such branches and root systems have been hostile to the ownership of Farley, Bower, and other owners of the 1185 Property. (Am. Compl. ¶ 65). (R. 725a; 729a). The allegations are supported by the evidentiary record. In this case, the Koresko in the complaint called the trees "boundary trees." (R.725a). Numerous properties throughout the Com

monwealth have trees or shrubs that create a border or boundary with adjoining properties. Defendant Bower admitted that the subject trees were the "borderline" and "kind of like a fence or a hedge." (R.1780a). Bower admitted that she never cut the branches and left the boundary in its natural condition. *Id.* If that border has existed notoriously, hostilely and continuously for 21 years, an adjoining property owner, the Developer and other Defendants were prohibited from taking any action that would in effect destroy the tree border. The Arborist's expert report confirmed by scientific calculation the age of the 11 affected trees, and the estimated time when the tree branches and roots crossed the boundary line. The calculations, summarized in the table below, demonstrate that every one of the trees satisfied the prescriptive period of use:

	Low	**High**	**Average**
AGE (YEARS)	**28.7**	**128.0**	**68.76**
Years to cross property line	**.5**	**12.5**	**6.44**
Years on other property	**28.4**	**126.1**	**64.48**

The average time on the other property, 64.48 years, was sufficiently continuous use to justify at least a classification of irrevocable license, similar to that granted in *Morning Call.* Although in possession of this scientific data, Judge Shenkin ignored it. There was no contrary evidence intro

duced below. Not only should was judgment on the pleadings erroneous, Neighbors were entitled to summary judgment. The Commonwealth Court should not have affirmed.

C. The Law of Easement or License Contemplate Even An Evolving Use, So Long As It Is Consistent With The Use During the Prescriptive Period.

In his opinion, Judge Shenkin found that any easement, if granted, would necessarily be limited: The court's Order stated: At most it seems to us that plaintiffs could have **easement for only that portion of the roots and branches** that existed.... In addition to the claim based upon the **easement for tree roots and branches,** plaintiffs seek relief based upon the claim that the subdivision process was flawed." (R.31a). The court's Opinion stated: "they contend that they have an easement over their neighbor's property for the roots and branches of trees". (R.37a).

The analysis of the claim of easement or license was incorrect. The right of use is not defined by the amount of growth at a point certain. Rather, "the extent of the rights matured by prescription is determined by the *use of the servient tenement* continued during the period of prescription." Powell and Boyer, at 387. Therefore, the right use of would not be defined as "the growth of the Norway Maple's branches to the extent of 30 feet across Defendant's property." See, Arborist Report, Table 1. Instead, the right of use would be defined as "the right of the branches and roots to continue to grow on Defendant's property." While the nature of the use and its extent during the prescriptive period set the general pattern which determines the extent of the use to be

made of the servient tract after the easement had matured, it cannot be maintained that such use is limited... Both the adverse user and the servient tenant must be charged with forseeing normal, natural and reasonable evolution and development of the use of property." Powell and Boyer, at 394. It cannot be disputed that tree roots and branches continue to grow absent interference.

D. <u>There is no reason to treat boundary trees differently than a fence or bushes.</u>

The Neighbors alleged and the Former Owner admitted that the trees grew along the boundary between the two parcels, forming a type of natural fence. The Commonwealth Court gave no reason why the established law of this Court should not be applied.

In *Zeglin v. Gahagen,* 571 Pa. 321, 327-38, 812 A.2d 558, 562-63 (2002), this Court found that a row of bushes, utility pole, and fence could delineate the extent of property lines extended under a theory of adverse possession. In *Brennan v. Manchester Crossings, Inc.,* 708 A.2d 815 (Pa.Super.1998) the Superior Court held on the basis of this Court's precedents that tending a lawn and berm were sufficient acts to satisfy a use itself. In *Lewkowicz v. Blumish,* 442 Pa. 369, 275 A.2d 69 (1971), this Court considered conflicting claims of 2 neighbors for prescriptive easement right over a driveway and restated the general law. Because the chancellor made no specific findings of fact, offering only conclusory findings Court made an independent scrutiny of the record to determine whether underlying facts supporting prescriptive easement were present. Findings no continues use, the

court overturned the chancellor's decision. However, in no precedents, other than the Commonwealth Courts, were certain encroachments given different treatment under law.

If a shrub or tree, through its branches and/or roots, is situated such that it notoriously, hostilely, and continuously for 21 years encroaches an adjoining property, it should be treated like any other encroachment, such that a potential easement or license could arise.

E. The "Musing" of the Superior Court in Jones v. Wagner, which noted agreement with the Restatement of Property concerning prescriptive easement, is correct and should be declared the law of this Commonwealth.

The Commonwealth Court held that adjoining property owners could use always self-help to amputate encroaching tree roots and branches, because the owners of encroaching tree parts *never* acquire a protected property interest. This holding conflicts with hornbook property law, which was recognized by the Superior Court in *dictum*. *Jones v. Wagner*, 425 Pa. Super.102, 624 A.2d 166, alloc. denied, 536 Pa. 626, 637 A.2d 286 1993).

The *Jones* court found itself with what it called a case of first impression. The Superior Court set out to articulate a landowners remedies if trees from an adjoining parcel hung over his property. The court concluded that the landowner could seek judicial intervention, or he could use help. However, the Court placed a specific limitation on its declaration of the law. Contrary to the Commonwealth Court, the *Jones* court recognized that self-help was only available for a limited time:

The Restatement notes that a continuing trespass is not a trespass at all if the actor causing the trespass has obtained an easement by adverse possession. Restatement (Second) of Torts §161, comment d. We cannot help but wonder whether the continued presence of encroaching tree branches, held openly, notoriously, hostilely, and continually for 21 years would create a prescriptive easement in the airspace which they hang. **If this would be the case, and we can find no Pennsylvania law which would indicate that a prescriptive easement is not available in this situation, a landowner who suffers actual harm for the first time during the tree owner's twenty-second year of hostile ownership, might very well be precluded from seeking a judicial, or even self-help, remedy.** This result, while not entirely unforeseeable, is anomalous. However, if an action is available without a showing a damage, the landowner has no reason to complain if a neighbor's tree causes damage after the prescriptive period has run. *See, contra, Pierce v. Casady,* 11 Kan.App.2d 23, 711 P.2d 766 (1985) (holding that airspace is generally not subject to prescriptive rights).

Jones v. Wagner, 425 Pa. Super. 102, 112 n.3, 624 A.2d. 166, 171 n.3 (1993) (emphasis added).

Instead of following the Restatement rule, and trying to reconcile itself with the scholarly survey of the law done by the Superior Court, the Commonwealth Court adopted *Pierce v. Casady,* as the law of Pennsylvania. That case should have not been given consideration. It involved a tree that hung over a garage. The owner of the tree was upset that the owner of the garage wanted to take down a limb that was in danger of crashing down on the garage. The Kansas in

termediate court called that limb "nuisance" and gave the garage owner permission to cut it down. The court only considered the easement theory in passing and noted its "inability to find any precedent" on the issue of "prescriptive easements in air rights branches." As noted by the footnote quoted above, the Jones court knew that *Casady* was contrary to the Restatement rule. Moreover, *Casady* conflicts with *Jones*. *Jones* says that a tree limb encroachment is actionable in trespass, not in nuisance. *Casady* is just bad law and its integration into this Commonwealth's jurisprudence should be rejected.

To the contrary, a Texas court recognized that the owner of a tree whose branches penetrated adjoining premises might obtain the right to the air space occupied by the encroachment, if he could establish the elements of an easement appurtenant, whether implied or prescriptive. *Ortiz v. Spann,* 671 S.W.2d 909 (Tex. Ct. App.1984). The court in *Ortiz v. Spann* acknowledged that the owners of three oak trees whose branches overhung adjoining premises might benefit from an easement appurtenant, implied or prescriptive, for the continued encroachment, though striking down a summary judgment in their favor because they did not establish by competent evidence that they met the requirements for establishing an easement of either type. The Commonwealth Court rejected this notion claiming that a prescriptive easement for tree branches and roots "is analogous to our Supreme Court's decision that the known presence of windows near a lot line does not create a prescriptive easement for light and air. *Maioriello v. Arlotta,* 364 Pa. 557, 73 A.2d 374 (1950)'. The Commonwealth Court failed to see that en

croachment of tree parts is technical trespass, but it is also a necessity for the life of tree. You can't miss seeing a tree, and the Court took judicial notice of the growth of roots. Merely looking out a window does not create an encroachment, does not put the servient tenement on notice of anything, and could not by law trigger the beginning of the prescriptive period.

The Commonwealth Court's position appears also to conflict with this Court's remarks in *Zeglin.* This Court approved Judge Coffroth's observation that people should not be excused from responsibility for taking notice any boundary structure and inquiring "about its origin, history, and function." After 21 years, the chips will be allowed to fall where they may, for reasons of equity and peace." *Zeglin,* 571 Pa. at 333, 812 A.2d at 565-66 (citation omitted).

Self-help remedies, envisioned by the Commonwealth Court, are not always available to a landowner whose property hosts overhanging branches or roots from trees on adjoining properties. This Court overruled such a broad self-help rule in removing boundary shrubs by applying the theory of adverse possession against neighbors who destroyed rows of bushes which, for decades, served as a boundary between two landowners. See Zeglin v. Gahagen, 571 Pa. 321, 812 A.2d 558 (2002). Self help is not always available. If you cannot use self-help to eject a tenant from your land, why should anyone be permitted to use self-help to damage property? [The landlord's right to distraint has been held unconstitutional. Allegheny *Clarklift v. Woodline Industries,* 356 Pa. Super. 269, 514 A.2d 606 (Pa.Super.1986). Additionally, this Court has abolished confession of judgment in

residential leases by rule changes, see Pa.R.C.P. 2970, explanatory comment]. Even at common law, self help was limited only to a reasonable response. It cannot be said that chopping tree roots indisciminantly is a reasoned response.

The lower courts held that Neighbors easement claims could not accord with Pennsylvania law. In fact, the opposite is true. The Commonwealth Court's holding offends precedent, constitutional and legislative policy. From the expert Arborist's report, the lower courts were aware that tree roots are within the dripline of the tree as the roots and branches grow similarly in pattern, albeit in different places. The sensitivity of the environment for tree roots is recognized by the ordinances that protect trees-which Township did not enforce. (Tredyffrin Code 181-39, 181-43, 181-56; R.725a, R.1760a-1763a.)[1] The dripline phenomenon was also recognized by the Chester County Planning Commission in its recommendation that no grading occur within the dripline of the trees. Pennsylvania has long recognized the private and public interest in trees, especially boundary trees. An easement and/or license by adverse possession for roots and/branches is perfectly consistent with the Commonwealth's constitutional duty to protect of environmental resources. PENNSYLVANIA CONST., ART. 1, SEC. 10. This Court should reverse and hold that as matter of law an

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[1] "Therefore, no permanent impervious cover, nor storage of equipment, materials, debris or fill, shall be allowed within the dripline of an existing specimen tree or individual tree, standing alone, with a minimum diameter of six inches...."

easement and/or irrevocable license can arise for boundary tree roots and/branches.

II. THE ACTIONS OF THE DEFENDANTS IMPARIED FUNDAMENTAL LIBERTY AND PROPERTY INTERESTS OF THE NEIGHBORS IN VIOLATION OF THE CONSTITUTIONS OF PENNSYVANIA AND THE UNITED STATES.

Neighbors complain that they were deprived of property rights of other interests that are constitutionally protected. They also claim that Defendants breached legal duties owed to Neighbors under statutory and common law.

The courts below confined their analysis to simply one asserted property interest rather than analyzing the panoply of rights at issue in this case.

Under Article I. Section 1 of the Pennsylvania Constitution, all persons within this Commonwealth possess a protected interest in the *possession and protection* of their property. These rights are substantively no different that those arising under the 5th and 14th Amendments of the United States Constitution.

There exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been *initially* recognized and protected by state law. The United States Supreme Court has repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the States seeks to remove or significantly alter that pro

tected status. *R. v. Com., Dept. of Public Welfare*, 535 Pa. 440, 451, 636 A.2d 142, 147 (1993), quoting, Paul v. Davis, 424 U.S. 693, 710-711, 96 S.Ct.1155, 1165, 47 L.Ed. 2d 405, 419 (1976) (footnote omitted.).

Neither of the courts below attempted to ascertain the full extent of liberty and property interests that were infringed by Defendants' actions. Focusing on roots, they failed to see the trees.

A. The Neighbors had a constitutionally protected interest in the enjoyment of their trees-lost by unconstitutional self-help.

The right to enjoy property without unlawful deprivation is a personal right no less important than the right to speak or the right to travel. *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972). The concept of a liberty interest cannot, therefore, be analyzed in monocular fashion. "Property does not have rights. People have rights." Id. The court cannot simply look at whether a trees' roots can be removed because archaic noticions of property law appear to say so. The proper analysis in a case like this is whether the actions of people in damaging an underground part of a tree, under color of state law, can reasonably lead to deprivation of enjoyment of the remainder of the citizen's property interest—the trees still situated on his own property. If so, that action must be subjected to a pre-deprivation due process procedure.

The present case is conceptually no different that cases like *Sniacach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 23 L.Ed. 2d 349, 89 S.Ct. 1820 (1969) (garnishment), *Fuentes v. Shevin*, 407 U.S. 67, 32 L.Ed. 2d 556, 92 S. Ct.1983 (1972) (repossession), *North Georgia Finishing*,

Inc. v. DiChem, Inc. 419 U.S. 601, 42 L.Ed. 2d. 751, 95 S.Ct.719 (1975) (garnishment). In *Sniadach,* the Court struck down a Wisconsin statute that permitted a creditor to effect prejudgment garnishment of wages without notice and prior hearing to the wage earner. In *Fuentes,* the Court likewise found a due process violation in state replevin provisions that permitted vendors to have goods seized through an *ex parte* application to a court clerk an the posting of a bond. In *North Georgia Finishing,* the Court again invalidated an *ex parte* garnishment statute that not only failed to provide for notice and prior hearing but also failed to require a bond, a detailed affidavit setting out the claim, the determination of a neutral magistrate, or a prompt post-deprivation hearing. *Id.,* at 419 U.S. 606-608. The eommon thread in these cases is that two parties asserted rights in the same piece of personal property, yet the Supreme Court held that no part could assert rights [*obtained from the state*] without giving the other party proper notice and opportunity to be heard. These and other decisions in the due process area teach that where the governmental action does not serve a particularly urgent public need, an individual in danger of losing his property is entitled to much more than the availability of a subsequent suit for redress. See, *Cedarbrook Realty v. Nahill,* 484 Pa. 441, 399 A.2d 374 (1979). In other words, the common law concepts equivalent to "self-help" in various settings have, one by one, fallen into the cave of historic anecdote. It is illogical to assure constitutional protections for personal property and leaseholds, yet allow any person or government to interfere with an apparent real property interest simply through the devices of non-notification and blitzkrieg construction.

In the present case, the Township, its agents, and other Defendants acted or failed to act in such a manner as to im

pair the Neighbors enjoyment of their trees. The Developer and its agents gouged through the root systems of the trees without inquiry or apology. The did so despite an Ordinance and a note on a plan that required that they not so act. The Township's agents failed to stop the Developer despite numerous visits to the site and written protests by the Neighbors. Their actions were the equivalent of an ex-parte deprivation of Neighbors' trees, except with no bond. In the modern age, any law or ordinance that allows a person to harm another's real property [2] without a pre-deprivation notice and hearing procedure is unconstitutional.

B. The Neighbors had a constitutionally protected expectation that the Township would not help others to destroy their trees.

The right to protection of property includes the logical expectation that government will not willingly act or fail to act when it is foreseeable that granting one person a privileged use of real estate will cause harm to another person's real or personal property. Protections provided to citizens by the government, like subdivision, zoning and licensing procedures, become expectations entitled to enforcement under notions of due process because of the nature of the government's protective activity and the citizen's dependency and reliance on that activity. The Supreme Court, 1975 Term, 90

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[2] A tree is a fixture once it is planted for non-commercial purpose and is intended to remain in the ground for a long time. See, Noll v. Harrisburg Area YMCA, 537 Pa. 274, 643 A.2d 81 (1994). If it grows naturally, it is *fructus naturals.* Both tree types are real property unless and until severed; their parts are real property until removed from the tree. Noll, supra, see also, Uniform Commercial Code, Definitions, 13 Pa.C.S.§9102 (2003).

Harv.LRev. 86-104. *See Bell v. Burson*, 402 U.S. 535, 539, 91 S.Ct.1586, 1589, 29 L.Ed.2d 90 (1971).

To have a property interest in an expectation or benefit, a person clearly must have more than abstract need or desire for it. He must have more that a unilateral expectation of it. He must, a have a legitimate claim of entitlement to it. *It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims. Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct.2701, 2709, 33 L.Ed.2d 548 (1972 (emphasis added).

The expectation that the Township would enforce its owner subdivision and tree protection ordinances was more that simply abstract. All citizens have a legitimate expectation that the laws will be enforced by a governmental entity equally against al parties subject to the government's jurisdiction. THE FEDERALIST, NO. 15 (Easton Press ed. 1979), pp.94-95. This expectation is reasonable because it is also guaranteed by the 14th Amendment. Since the Chester County Planning Commission approval letter and Tredyffrin Township Ordinances stated clearly that no building should take place within the dripline of any tree, the Neighbors had a reasonable expectation that the Township would not allow construction within the dripline of *any* tree, whether the tree trunk was located on the subdivided property or on their adjoining parcel. Most supportive of the expectation interest of the Neighbors is Article 1, section 10 of the Pennsylvania Constitution. The government has an obligation to protect the environment, including its esthetic values, as trustee for all citizens. This public trust includes the government's right

to prevent an individual fro doing as he wishes with property he owns. See. *Machipongo Land and Coal Co., Inc. v. Co.*, 569 Pa. 3, 799 A.2d 751 (2002). The Neighbors had a reasonable expectation that the Ordinances and Constitutions would be enforced as written by public trustees to protect Neighbors' trees from destruction.

C. Neighbors Were Not Afforded Procedural Due Process

The guarantee of due process of law, in Pennsylvania jurisprudence, emanates from a number of provisions of the Declaration of Rights, particularly Article I, Sections, , 9, and 11 of the Pennsylvania Constitution. These provisions in turn have enjoyed a long history in the Commonwealth, tracing their roots to early documents, including the English Magna Charta. *Harris v. State Bd. of Optometrical Examiners*, 287 Pa. 531, 135 A.237, 238 (Pa.1926).

The Due Process Clause of the Fourteenth Amendment to the Federal Constitution requires at a minimum that the deprivation of life, liberty or property by adjudication must be proceeded by notice and opportunity for hearing appropriate to the nature of the case. The United States Supreme Court beginning with *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 94 L.Ed. 865, 70 S. Ct. 652 (1950), has invoked the Due Process Clause and required states to make efforts to provide actual notice to all parties whose interests are affected by proceedings before a tribunal.

This court has repeatedly recognized that a notice by mail or more to someone who will potentially be seriously affected by a government act is a minimum guarantee of due

process. *In re Upset Sale v. Estate of Schumo,* 505 Pa. 327, 479 A.2d 940 (1984). In Upset Sale, this Court considered whether it was constitutional to give lienholders of property only a general notice by publication. In framing the issue, the Court asked the only really pertinent question in a modern analysis of due process: How are lienholders to exercise their statutory rights[in property], or timely object [to a procedure that eliminates their rights] when they are not given notice? 505 Pa. at 337. The Court went on to find that "the general notice is inadequate to meet the requirements of due process as far as [skateholders] are concerned. Notice directed only to the owner and taxing bodies, as required by the statute, does not advise [others with actual property interests] that their interest may be affected...." Id. at 337 to 338. General notice advises the general public only that a piece of real estate is to be subdivided. "It does not inform individuals who have property interests that their interests my be affected... such individuals are entitled to more than a "squib" in local newspaper or county law journal buried between the automobile sales and want ads." Id. at 338. The Court made a common sense balancing of the respective interests: "The general public will neither lose nor gain anything by virtue of a tax sale, but judgment creditors are likely to lose the security of their debts and hence their property." Id. This Court concluded: "Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." (Citation omitted.). Id. at 339.

In the present case, Neighbors got nothing except a ruse awakening from the Township, Developer, other defendants or other state actors—no notice and no opportunity to be heard. The risk erroneous deprivation of a Neighbor's potential rights is inherent in any system that requires no notice to parties who have land that borders a parcel subject to potential subdivision. Notice will not impair the Township's interest in civic harmony and effective regulation of subdivisions. Notice will not impair the Developer's privilege to build only in accordance with applicable codes and law. The suggested notice, as opposed to no notice, can be accomplished in a relatively innocuous manner –U.S. mail to the people next door. Just as in *Upset Sale*, procedural due process rights cannot be protected without a notice to any party whose property rights have the highest chance of being affected by the privileges accorded to a Developer through the Subdivision Ordinance.

D. The Township and State Actors Denied Neighbors' Right to Substantive Due Process

Substantive due process is the "esoteric concept interwoven within our judicial framework to guarantee fundamental fairness and substantial justice," *Commonwealth v. Stipetich,* 539 Pa. 428, 652 A.2d 1294, 1299 (Pa.1995) (Cappy, J. dissenting), and its precepts protect fundamental liberty interests against infringement by the government. Any substantive due process challenge must weighed against the Tenth Amendment to the United States Constitution, which preserves for the states the powers' not delegated to the United States by the Constitution." One of the most important functions of government is proper exercise of the

police power, the definition of limits of which have been defined previously by this Court:

> The exercise of the police power for the purpose of preserving the public health, safety and morals, and it is true that, to accomplish that purpose, the legislature may limit the enjoyment o f personal liberty and property. It is also true... that the police power has been juridically extended to many fields of social and economic welfare. But [this] power is not unrestricted...[A] law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained. Under the guise of protecting the public interests[,] the legislature may not arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. The question whether any particular statutory provision is so related to the public good and so reasonable in the means it prescribes as to justify the exercise of the police power, is one for the judgment, in the first instance, of the law-making branch of the government, but its final determination is for the courts.

Gambone v. Commonwealth, 375 Pa. 547, 101 A.2d 634, 636-37 (Pa.1954). More simply, the rights of individuals are subject to the lawful exercise of the power of the State to protect the public health, safety, welfare, and morals by promulgating laws and regulations that reasonably accomplish those ends. *Gambone,* 2101 A.2d at 637.

When confronted with a constitutional challenge premise upon substantive due process grounds, the threshold inquiry

is whether the challenged statue purports to restrict or regulate a constitutionally protected right, *Commonwealth v. Burnsworth,* 543 Pa.18, 669 A.2d 883, 889 (Pa..1995).

Pursuant to that analysis, legislation that significantly interferes with the exercise of a fundamental right will be upheld only if it is necessary to promote a compelling state interest and is narrowly tailored to effectuate that state purpose. *Nixon v. Dept' of Pub. Welfare Nixon v. Dept' of Pub. Welfare*, 839 A.2d 277, 2003 WL 23095675 at *5 (2003); *Commonwealth v. Robinson*, 497 Pa. 49, 438 A.2d 964 (Pa.1981), appeal dismissed, 457 U.S. 1101, 73 L.Ed. 2d 1310 (1982). In a substantive due process analysis, the rights of the individual must be balanced against the public interest. *In re Realen Valley Forge Greenes Assocs.*, 838 A.2d 718, 2003 WL 22971249 at *8 (Pa.2003); *Secretary of Revenue v. John's Vending Corp.*, 453 Pa. 488, 309 A.2d 358, 361 (Pa.1973).

Without doubt, the Constitutions of this Commonwealth and the United States declare that the protection and ownership of property is fundamental right, More than a century, ago, Mr. Justice Field of the United States Supreme Court commented: It is undoubtedly the right of every citizen of the United to continue their possession and use of their property, Real or personal property cannot be arbitrarily taken from them..." *Dent v. West Virginia*, 129 U.S. 114, 121-22, 32 L.Ed. 623, 9 S. Ct. 231 (1889). Accordingly, the purpose of substantive due process analysis, deprivation of such rights must survive strict scrutiny, and legislation infringing upon that right need only be examined to determine whether there is a real and substantial relationship to a governmental

interest. See *Pirillo v. Takiff,* 462 Pa. 511, 341 A.2d 896 (Pa.1975),cert. denied, 423 U.S 1083, 47 L.Ed. 2d 94 (1976).

States have a strong interest in regulating the uses of lands and the practice of the building tradesmen within their borders, and they have broad power to establish standards for approval and licensing in order to protect the valid interest of the public. A state may impose those requirements that it believes necessary to protect its citizenry, so long as those are not imposed in a fashion that deprive the constitutional protections afforded to both the regulated individuals and the citizens whom the Government serves generally. *Notwithstanding, the privilege of possible subdivision can never trump the rights or property owner, and any law, ordinance or procedure that allows such a thing to happen cannot survive constitutional scrutiny.* A governmental entity has no duty to ensure that a subdivision is granted, just as a Developer has no right to get and keep a subdivision unless he plays by all the rules. Government has a duty, though, t enact and execute such procedures that are reasonably calculated to prevent it from being used as a pawn by Developer to harm innocent citizens.

In the instant matter, Neighbors were not provided with (1) notice of the potential assault against their property by the Defendants, (2) an opportunity to respond to the provisions of the planned use, and (3) the opportunity to testify and present evidence on their behalf. This is what due process requires, and its absence in this mater demonstrates the primary constitutional infirmity of the Tredyffrin ordinances relating to subdivisions.

Had Neighbors been given notice, they could have presented to Township authorities, *before the damage was done,* all the concerns expressed in the lawsuit. They could have alerted the Township to the necessity of moving in the lawsuit. They could have alerted the Township to the necessity of moving the driveway and utility dish to another location of the proposed subdivision. After all, there were approximately 2.3 acres of ground available and an adjacent private road. It would have been simple to "flip the plan" and put the driveway on the other portion of the property farthest from the Neighbors trees instead of only a few feet away. The Township could have advised the Developer that the ordinance that outlawed building in a dripline meant ALL DRIPLINES. And the Neighbors could have that the Township demand to know where the Developer intended to place the buried propane tanks.

Instead, the Township made a decision (based on the advice of its conflicted Solicitor,) not to give Neighbors, other adjoining landowners, or anyone else any effective notice of the changes to their neighborhood. In the modern world, there is no rational basis for a Township not to want the residents in a neighborhood to know it is being changed. At the very least, however, the next door Neighbors have a right to know.

No Township can contest the reality that most property disputes between neighbors involve issues related to boundaries. The present Subdivision Ordinance makes those disputes more likely. No government can rationally embrace any policy, that increases the likelihood of litigation among neighbors. No such policy, expressed in an ordinance, can

ever be defended as rationally protecting "health, safety, and morals." The no-notice provision of the Subdivision Ordinance does nothing to address or eliminate "an evil at hand for correction." *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1995). Rather, it creates evils of the sort at bar and perhaps more beyond present imagination.

There is no provision in either the state or federal constitution requiring a Township to allow subdivision of previously zoned property, increase residential density, or to grant a developer a permit to build a house for profit. The grant of permission to subdivided property is a privilege, just as it is a privilege to receive a license to construct houses for profit.. Such privileges are governed strictly as a matter of state policy is set by a legislative body, in this case a Township. If the privilege is offered, it must be conditioned on satisfaction of necessary to protect the citizenry. But that privilege cannot be elevated so as to trample fundamental property rights of other citizens.

Beginning fifty years ago, before email and cellular phones, before computerized databases with landowners' personal information, our Supreme Court found that governments had no rational basis to claim that the price of a letter was too burdensome when compared to fundamental property rights. *Mullane, supra.* Pennsylvania jurisprudence acknowledges this. *Upset Sale, supra.* There is no rational basis for nay ordinance that subjects substantial rights to secret elimination because someone does not want to pay for a stamp and send a letter. The cost to the Township, 37 cents, can never outweigh the destruction in this case of 12 unique works of nature.

Slight geographical distinctions, in this case a few feet, are irrelevant to the rights of equal protection of the laws and due process. It would seem absurd for a Township to apply an ordinance for the protection of trees so that a Developer would be required to protect the integrity of the branches and roots of *trees whose trunks are on the subdivided property*, but permit the Developer the unrestrained privilege of serving tree branches and roots from a Neighbor's tree whose trunks lie just a few feet from the boundary line. It is very true that "[i]n the absence of bad faith, fraud, capricious action or abuse of power, reviewing courts will not inquire into the wisdom of [an administrative] agency's action or into the details or manner of executing agency action." *Slawek v. State Bd. Of Med. Ed & Licensure,* 526 Pa. 316, 586 A.2d 362, 365 (Pa.1991). But, can there be any more capricious, illogical or unwise action than that grants a privilege of destruction to a rapist of the land at the expense of the property of a citizen who will be left there long after the developer has taken his money and gone on to kill another tree?

There is no legitimate state objective in secrecy when it comes to issues of zoning and land use. There is no excuse for not giving notice to the persons most likely to be impacted b a change in the use of somebody's land. Any financial burden of notice to adjoining landowners of a possible subdivision is illusory. It can be passed on legally and reasonably to the Developer as an additional condition for getting a privilege. Any argument that this notice might slow down a subdivision process also rings hollow. In this country, we do not sacrifice liberty interest for speed. For these

reasons, the Tredyffrin Township Subdivision Ordinance is unconstitutional as written and applied.

There is a reasonable, less restrictive alternative: give people some actual notice, and enforce the ordinances as written. Do not allow Developers to simply put what they want to a Subdivision Plan. Have a building inspector look at the site before a plan is approved and note possible impact on neighboring properties. It seems reasonable to require the Ordinance to be interpreted and applied as a function of basic equal protection. It should be made clear that the location of all tree roots relating to boundary trees, not just those of the trees whose trunks are on the subdivided property, are the proper subject of inquiry and protection by the Township. In fact, any contemplated use that has the reasonable possibility of affecting an adjoining landowner should be part of the subdivision plan. Contrary interpretation and application of the ordinance deprives other citizens of equal protection of the laws.

III. THE NEIGHBORS, AS ADJOINGIN LANDOWNERS MOST LIKELY TO BE HARMED, HAD STANDING TO ENFORCE PROVISIONS OF THE SUBDIVISION PALN AND COMPALIN ABOUT VIOLATIONS OF RESTRICTIONS AND ORDINANCES.

The trial court held that the Municipalities Planning Code ("MPC") barred from Plaintiffs from bringing suit, even thought Neighbors received no notice of the Subdivision plan filed by the Developer and Former Owner. The Commonwealth Court agreed with the Neighbors

that although Section 617 of the MPC, 53 P.S. § 10617, establishes a cause of action for any owner of real property who shows that his or her property or person will be substantially affected by the violation of an ordinance, this Court held three years after enactment of § 617 that an adjacent property owner "as an aggrieved neighbor, had an independent right to seek relief for a zoning violation next door and that right could be asserted in an equity action.: *Frye v. City of Monogahela,* 526 Pa. 170. 584 A.2d 946 (1991); see also. *Peden v Gambone Bros.* Dev. Co., 798 A.2d 305 (Pa.Cmwlth.2002) (adjacent landowners can sue in equity to compel compliance with zoning ordinance requiring a natural buffer).

Despite this disagreement with the Common Pleas court, the Commonwealth Court held that Neighbors could not complain that the Developer failed to list the dripline and location of their trees on boundary trees on the subdivision plan Pennsylvania, since the Court said the trees were not entitled to protection. Secondly, Neighbors had no right to complain that the Developer violated the subdivision plan by removing mature trees that were supposed to be retained because Neighbors had no standing. Further, the Court said that the Township's eventual enforcement of setback requirements, on account of Developer's illegal placement of underground propane tanks, rendered Neighbors' action moot with no entitlement to compensation.

The law protects the branches and roots of Neighbors' trees from Developers and others, see part 1, above, so Neighbors were entitled to relief.

On the issue of standing to enforce the plan and complain about violations of ordinances and removal of mature trees, the Commonwealth Court attempted to distinguish this case from its decision in *Doylestown Township v. Teeling*, 160 Pa. Commw. 397, 635 A.2d 657 (1993). While it is true that a note or restriction on a subdivision plan "is a covenant running with the land which could be enforced in equity by a purchaser of a lot in the subdivision," the Court "reject [ed] Neighbors' suggestion that every detail on a subdivision plan creates a covenant which may be enforced by anyone." The Commonwealth Court relied on this Court's holding in *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975). And claimed that Neighbors' pled only a generalized citizen's interest and not an individualized injury. As argued previously, the Commonwealth Court ignored two fundamental constitutional rights that Neighbors were entitled to enforce. Neighbors had a right to expect that the Township would do its duty and enforce its own ordinances. Neighbors also had a right to expect that the Township comply with its Constitutionally imposed duty to protect natural resources, including trees, for the good of the public. Under the Commonwealth Court's analysis, although citizens are the intended beneficiaries of Article I, section 10 of the Pennsylvania Constitution, nobody has a remedy. This certainly deviates from the jurisprudence of the United States Supreme Court., which has consistently held that where the government assumes duties equivalent to that of trustee, the intended beneficiaries of that "public trust" have standing to sue. At the very least, the

most directly affected beneficiaries must have standing to sue or the constitutional provision means nothing.

In *William Penn*, this Court stated the general rule that standing requires a plaintiff to have a substantial, direct, and immediate interest in the outcome of litigation. In *South Whitehall Township Police Service v. South Whitehall Township*, 521 Pa. 82, 555 A.2d 793, (1989), this Court explained:

> A "substantial" interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the common law. A "direct" interest requires a showing that the matter complained of caused harm to the party's interest. An "immediate" interest involves the nature of the causal connection between the action complained of and the injury to the party challenging the zone of interests sought to be protected by the statue or constitutional guarantee in question. 555 A.2d at 795 (citations omitted).

However, this general rule is not without exception. In *Faden v. Philadelphia Housing Authority*, 424 Pa, 273, 227 A.2d 619 (1967), and *Application of Biester*, 487 Pa, 438, 409 A.2d 848 (1979), this Court found standing when the degree of causal connection is small but judicial review is necessary to protect against governmental action which otherwise would go unchallenged. See *Sprague v. Casey*, 520 Pa. 38, 550 A.2d 184 (1988), (granting standing to a taxpayer to challenge the constitutionality of a proposed judicial election scheduled for November of 1988). The Commonwealth Court

never considered this exception. Neighbors qualify because the governmental action and inaction at the heart of this case would otherwise go unchallenged.

Notwithstanding, Neighbors satisfied each of the *William Penn* tests. As adjoining landowners, Neighbors were the parties most likely to be harmed by violations of plan provisions and ordinances. Moreover, adjoining landowners are more likely to have a direct esthetic interest in the beauty of trees next door that are illegally cut down. Neighbors' interest in the construction contemplated by the subdivision plan and violations of ordinances exceeded those of any other citizen, so their interest was substantial. Neighbors' interest is direct because Neighbors alleged that the deviation from plans and ordinances violated their constitutional rights, It is only common sense that the Township regulated the location of underground tanks and impervious cover to minimize potential damage to *adjoining property owners* from explosion, leakage, or other damage. Further, Neighbors' interest is immediate because they showed a casual connection between the violation of the plan provisions and ordinances and their injuries, which in this case is exposure to the harms the ordinances and condition of subdivision are designed to prevent. *See Hydropress Cnvtl. Servs v. Twp. Of Upper Mount Bethel* 836 A.2d 912, 917 (2003). There is no reason to deny standing in a state court when the same allegations and injuries would confer standing in a federal court, especially when the complaint includes federal constitutional claims. *See Friends of Earth, Inc. v. Laidlaw Environ*

mental Services (TOC), Inc. 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed. 2d 610 (2000).

Finally, the Commonwealth Court's holding cannot be reconciled with this Court's decision of *Doyle v. South Pittsburgh Water Co.*, 414 Pa. 199, 199 A.2d 875 (1964) and its progeny. This case falls directly within the "orbit of harm" rule espoused by Justice Musmanno in *Doyle*[W]here a party to a contract assumes a duty to the other party to the contract, and it is foreseeable that a breach of that duty will cause injury to some third person not a party to the contract, the contracting party owes a duty to all those falling within the foreseeable orbit of risk of harm." *Doyle, supra,* 414 Pa. at 207, 199 A.2d at 878; see *Prost v. Caldwell Store, Inc.*, 409 Pa. 421, 187 A.2d 273 (1963); Restatement (Second) of Torts §324 A. (1965). This duty was also recognized by this court in *Bisson v. John B. Kelly, Inc.* 314 Pa. 99, 170 A. 139 (1934):

It is a primary social duty of every person to take thought and have a care lest his action result in injuries to others. This social duty the law recognizes and enforces, and for any injury resulting from any person's lack of elementary forethought, the law holds that person accountable." *Id.* 314 Pa, at 110, 170 A. at 143.

What is a subdivision plan ant the notes thereon, if not some form of contract? If the Commonwealth Court is correct that a plan is a type of restrictive covenant, the plan is "more that a contract, but less than an easement." Smith and Boyer, SURVEY OF THE LAW OF PROP

ERTY (West 1971),p. 348. In Tredyffrin Township, however, grant of a building permit is subject to the Developer's express written promises on its application to comply with the plan and its restrictions, including all laws and ordinances, whether or not separately enumerated. See Complaint, Exhibit B; R.R. at _____. In this case, there is a unilateral contract by the Developer to comply with the plan and ordinances, subject to a condition subsequent—the Township's right to take away development rights if noncompliance occurs. A personal contract exits, along with a voluntary covenant placed on the land, but the Commonwealth Court limited those who can be within the "orbit of harm" to only those person who purchase lots from a subdivider. The Court's analysis may appear technically sound, but ancient property law of equitable servitudes did not contemplate an additional express promise or the "orbit of harm" doctrine. See Powell and Boyer, at 376-77. The result does not stand up to an analysis in tort. The duty of the Developer and Township to Neighbors arises as a matter of law, not as a matter of privity of estate. Regardless of roots, they had no right to take an action that would ultimately harm the trees. The analysis also does not survive the additional anomaly of Pennsylvania constitutional law that imposes affirmative duties on the Township as public trustee of the environmental, something also missing at common law.

IN THE COURT OF COMMON PLEAS
CHESTER COUNTY, PENNSYLVANIA

NO. 01-05343

CIVIL ACTION-EQUITY

JOHN J. KORESKO, V., et al

Plaintiffs

VS.

MARK FARLEY, et al

Defendants

Virginia I. Miller, Esquire, Attorney for Plaintiffs
Robert W. Lentz, Esquire, Attorney for Defendants Farley- and Seaton Wayne W. Congar, Esquire, Attorney for Defendant Bower William H. Lamb, Esquire, Attorney for Defendant Township

ORDER

AND NOW, this 13th day of February 2002, upon consideration of plaintiff's motion for leave to amend complaint and the response thereto on behalf of defendants Farley and Seaton Ross, it is hereby ORDERED that the motion is

GRANTED[1]. Plaintiffs may file an amended complaint in equity[2], in form and substance substantially as appended to the motion, within twenty (20) days from the date of this order.

BY THE COURT

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[1] Our review of this motion is based upon procedure only and does not implicate the merit, or lack of merit, of the substance of the amended complaint. The amended complaint will constitute original process as to any party named in the amended complaint who has not hereto fore been a party to this action and service upon any such party must be made accordingly. Answering defendants have pointed out the existence of the lawsuit at No. 01-10286. This order is without prejudice to the right of any newly named defendant in this action to raise the defense of pending litigation if the action at No. 01-10296 is not voluntarily discontinued by plaintiffs.

[2] Defendants Farley and Seaton Ross consistently and erroneously caption the matter as being in law and equity, not a permitted form of action. This matter is in only and all parties should use only the correct caption.

IN THE COURT OF COMMON PLEAS
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CIVIL ACTION-EQUITY

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Plaintiffs

VS.

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Defendants

Virginia I. Miller, Esquire, Attorney for Plaintiffs
Robert W. Lentz, Esquire, Attorney for Defendants Farley and Seaton Wayne W. Congar, Esquire, Attorney for Defendant Bower William H. Lamb, Esquire, Attorney for Defendant Township No appearance for Defendant Bryn Mawr Custom Home

ORDER

AND NOW, this 13th day of September 2001, upon consideration of the preliminary objections of defendant Bower and plaintiffs' response thereto, it is hereby ORDERED that the preliminary objections are OVERRULED[1]. Pursuant to

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[1] Although it was only with great difficulty that that we were able to cut through the pomposity and verbosity of the pleadings and

Pa. R. C. P. No. 1028(d), objecting defendant may plead over to plaintiff's complaint within thirty (30) days from the date of this

BY THE COURT:

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briefs, which only exacerbated the near incomprehensibility of these materials, we ultimately find that the preliminary objections must be overruled, although the basis for our ruling is quite limited. The main thrust of the preliminary objections is that injunctive relief is not available from defendant Bower, as she no longer has any interest in the subject property. While technically that fact is not of record, it would appear to be correct that none of the injunctive relief sought by plaintiffs is available from defendant Bower and plaintiffs seem to acquiesce to the position that defendant Bower has no remaining interest in the property. If we were not overruling the preliminary objections on other grounds, we would have examined those issues and contentions more closely. However, the complaint seeks monetary damages (e. g. restitution) which relief might be available from this defendant. On the basis of the record before us at this time (which does not include allegations of fact not contained in the complaint). We cannot say that no cause of action could possibly be maintained against (and relief obtained from) defendant Bower. Therefore the preliminary objections must be overruled.

IN THE COURT OF COMMON PLEAS
CHESTER, PENNSYLVANIA
NO. 01-05343

CIVIL ACTION-EQUITY

JOHN J. KORESKO, V, et al,
Plaintiffs,

Vs.

MARK FARLEY, et al
Defendants

Virginia I. Miller, Esquire, Attorneys for Plaintiffs
Henry N. Portner, Esquire, Attorney for Defendant Bower
Robert W. Lentz, Esquire, Attorney for Defendants Farley, Seaton Ross, Grupps, Kayes and Bryn Mawr Custom Home, Inc. William H. Lamb, Esquire, Attorney for Defendant Township

ORDER

AND NOW, this 4th day of December 2002, upon consideration of this motion of defendants Grupps and Kayes for judgment on the pleadings and plaintiffs' response thereto, it is hereby ORDERED that the motion is GRANTED[1] and

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[1] Various defendants have moved for judgment on the pleadings, full or partial, pursuant to Pa. R.C.P. No. 1034. As plaintiffs correctly note, judgment on the pleadings may be granted only where there are no disputed issues of fact and the moving party record does not go outside of the pleadings. In determining if there is a

dispute of fact, we are required to confine our review to the pleadings and relevant documents which are a part of the pleadings. We note the plaintiffs' responses to new matter generally ignore all Pennsylvania rules and practice regarding pleadings and ignore that Pennsylvania is a fact pleading state and appear to be more in the nature of memoranda of law than pleadings. But, for the purpose of this motion, we accept the fact (but not conclusions of law) as stated in the complaint and plaintiffs' other pleadings. *Booher v. Olczak*, 2002 Pa Super 106, 797 A. 2d 342 (2002). In this case, the only truly relevant pleading is the complaint. There are no allegations of fact by plaintiff in any other pleading, which are significant or material to the issues raised by these motions. Even judged by this standard, plaintiffs do not make out any cause of action against several of the defendants. Plaintiffs place great weight on our denial of preliminary objections of defendant Bower to the original complaint, contending that our order established that the plaintiffs "did state a valid cause of action based upon adverse possession and easement." Review of our order makes clear that the preliminary objections were based on the contention that injunctive relief was not available from defendant Bower and that our denial of the demurrer was based upon the fact the complaint also sought money damages. The complaint alleged, inter alia, that defendant Bower together with the Farley defendants had" intentionally withheld material information" during the course of the subdivision process and had otherwise taken various actions causing plaintiffs monetary damages. As we noted in our order, the complaint was nearly incomprehensible but we were not willing to rule at that point that it was so clear that plaintiffs could not prevail against Bower on the claim for monetary damages that they should then be put entirely out of court. We did further note that "the basis for our ruling is quite limited." Plaintiffs now wish to give that very limited ruling a very board construction. Moreover, plaintiffs have filed an amended complaint, so that they have had the opportunity to cure the ambiguities in the original compliant, and we are dealing with different parties. Denying prelimi-

nary objections does not preclude consideration of a motion for judgment on the pleading. DiAndrea v. Reliance Savings and Loan Association, 310 Pa. Super. 510, 456 A. 2d 1066 (1983). We are satisfied that Pennsylvania does not and will not recognize an easement for tree roots and overhanging branches. Plaintiffs cite speculation from a case, Jones v. Wagner, 425 Pa. Super. 102, 642 A. 2d 166 (1993), in which, in a footnote, Judge Olsezwski "wonder[s] whether the continued presence of encroaching tree branches, held openly, notoriously, hostility, and continually for 21 years would create a prescriptive easement in the airspace which they hang." But plaintiffs ignore the actual holding of the that case which is directly contrary to appear to have overlooked is the extent of their hypothetical easement. In other words, plaintiffs acknowledge that their claim is based upon twenty-one (21) years of possession yet they would apparently contend that their easement extends to the entirety of the root system, notwithstanding that only a part thereof could possibly have been in existence for twenty-one (21) years. It is simply ludicrous to argue that if a root or a branch encroaches on another's property to any extent whatsoever then the owner of the tree has an unlimited easement over the property of that other to the full extent that those branches or roots might grow over time. At most, it seems to us, plaintiffs could have an easement for only that portion of the roots and branches, which existed twenty-one (21) years ago. No easement would have been established for any encroachment existing for less than the requisite period of time. The difficulty of proving where tree roots existed twenty-one (21) years ago seems insurmountable. Without an easement for branches or roots, the pleadings fail to state any cause of action against defendants Grupps and Kayes. The other allegations which tangentially involve the Grupps and Kayes likewise do not set forth a cause of action against them. Nor is it necessary to keep these defendants in the lawsuit because of the challenge to the entire subdivision. We find that claim to be without merit also and, therefore, there is no basis upon which these defendants should remain as such.

judgment is entered in favor ofdefendants Robert W. Grupp, Jan M. Grupp, Stephen D. Kaye and Diana S. Kaye and against plaintiffs, John J. Koresko, v, and Bonnie J. Koresko, in no amount.

AND, FURTHER, upon consideration of the motion of defendants Farley and Seaton Ross, L. P. and Bryn Mawr Custom Home Inc. for partial judgement on the plendings and plaintiffs response thereto, it is hereby ORDERED that the motion is GRANTED[2] and judgment is entered in favor of defendants Farley and Seaton Ross, L. P. and Bryn Mawr Custom Home, Inc. and against plaintiffs in no amount as to Counts I, II, IV, V and VI.

AND, FURTHER, upon consideration of the motion of defendant Township for judgment on the pleadings and plaintiffs' response thereto, it is hereby ORDERED that the motion is GRANTED[3] and judgment is entered in favor of

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[2] In addition to the claim based upon an easement for tree branches and roots, plaintiffs also seek relief based upon the claim that the subdivision approval process was flawed. Arguably, the exclusive method for challenging approval of a subdivision is pursuant to the procedures set forth in the Municipalities Planning Code. See Goldstein v. Upper Merion Township 14 Pa. Commonwealth Ct. 201, 403 A.2d 211 (1979). But by whatever procedures plaintiffs attempt to proceed in the absence of an easements the pleadings fail to state any cause of action based upon the subdivision approval.

[3] Even if there were an easement for tree roots and branches, plaintiffs have still not set forth a cause of action against defendant Township. At most the complaint alleges that the Township's ap-

defendant Tredyffrin Township and against plaintiffs in no amount.

AND, FURTHER, upon consideration of the motion of plaintiffs to compel discovery responses from defendants Farley and Seaton Ross, L. P. and the responses of those defendants thereto, it is hereby ORDERED that the motion is DENIED as moot[4] but without prejudice to the rights of plaintiffs to file a new motion to compel after giving due consideration to the other rulings in this order.

AND, FURTHER, upon consideration of plaintiffs motion and supplemental motion to disqualify Lamb, Windle & McBrlane, P.C. as counsel for defendant Township and the responses thereto of defendant Township, it is hereby ORDERED that the motions are DENIED as moot, although

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proval of a subdivision plan was erroneous. Such claim, even if true, would not give rise to a cause of action against the Township other than as a challenge to the approval pursuant to the provisions of the Municipalities Planning Code Plaintiffs allege violations of their rights under the constitutions of the United States of America and the Commonwealth of Pennsylvania. Plaintiffs have presented no argument to substantiate these claims

[4] It would appear that the discovery at issue relates to claims which other where in this order have been found to be without merit. However, if plaintiffs continue to contend that the discovery which they seek relates to claims, which remain, they may renew their request for discovery responses and, defendants fail to adequately respond to that request, plaintiffs may file a new motion to compel.

we note that if we had reached the merits of the motions, they would have been denied as being without merit.

AND, FURTHER, upon consideration of the motion of defendants Seaton Ross, L. P. and Farley in limine with respect to preclusion of expert witness testimony and plaintiffs' response thereto, it is hereby ORDERED that the motion is DENIED[5] without prejudice

AND, FURTHER, upon consideration of the motion of defendant Township for sanctions against plaintiffs and Virginia Miller, Esquire, and plaintiffs' response thereto, it is hereby ORDERED that the motion is DENIED[6] without prejudice.

BY THE COURT:

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[5] For the reasons advanced by plaintiffs, it would be premature to grant this motion at this time. Nevertheless, witnesses may be precluded pursuant to Pa. R. C. P. No. 4003. 5(b) if the mandates of Pa. R.C.P. No. 4003. 5 area not met seasonably prior to trial.

[6] The factual record is not sufficiently clear so as to permit the imposition of sanctions pursuant to Pa. R.C.P. No 1023 .1 et seq. at this time. Inasmuch as the conduct of the plaintiffs and their counsel took place over a period of time which spanned the effective date of these rules, it is at best an open question as to whether actions taken prior to the effective date of these rules could be considered on the issue of whether or not sanctions can be imposed and, if so, what sanctions would be appropriate. It is likewise not clear that the mandates of Pa. R. C. P. No. 1023 .1 et Seq. can be certified pursuant to subparagraph (b). Nevertheless, our denial is without prejudice and is in no way a ruling upon the merits of the motion.

IN THE COURT OF COMMON PLEAS CHESTER COUNTY, PENNSYLVANIA

NO. 01-05343

CIVIL ACTION-LAW

JOHN J. KORESKO, V., et al

Plaintiffs

Vs.

MARK FARLEY, et al,

Defendants

Virginia L. Miller, Esquire, and John J. Koresko, V., Esquire, Attorneys for Plaintiffs Henry N. Portner, Esquire, Attorney for Defendant Bower Robert W. Lentz, Esquire, Attorney for Defendants Farley, Seaton Ross, Grupps, Kayes, and Bryn Mawr Custom Home, Inc. William L. Lamb, Esquire, Attorney for Defendant Township

ORDER

AND NOW, this 18th day December, 2002, upon consideration of the plaintiffs' motion for partial summary judgment, defendants responses thereto, and the briefs and arguments of counsel, its is hereby ORDERED that the motion is DENIED. The Court Administrator is directed to list

this matter for trial as soon as possible consistent with the Court's other business.[1]

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[1] At least arguably, Pa. R.C.P. No. 1020 (a) applies to actins in equity through Pa. R. C.P. No. 1501. Although Pa. R.C.P. No. 1508 governs pleading multiple causes of action in equity cases, nothing therein is inconsistent with the requirements that each count contain a demand for relief and the customary practice is certainly do so. As plaintiffs have not done so, the relief requested in Count III is not entirely clear. We will, therefore, assume that plaintiffs are seeking both monetary damages and injunctive relief and will hear this case without a jury sitting as a Chancellor in Equity. If plaintiffs are requesting only money damages in Count III, we will, upon request of plaintiffs, transfer this matter to the law side of the court.

IN THE COURT OF COMMON PLEAS CHESTER COUNTY, PENNSYLVANIA

NO. 01-05343
CIVIL ACTION-LAW

JOHN J. KORESKO, V., et al
Plaintiffs

Vs.

MARK FARLEY, et al,
Defendants

Virginia L. Miller, Esquire, and John J. Koresko, V., Esquire, Attorneys for Plaintiffs Henry N. Portner, Esquire, Attorney for Defendant Bower Robert W. Lentz, Esquire, Attorney for Defendants Farley, Seaton Ross, Grupps, Kayes, and Bryn Mawr Custom Home, Inc. William L. Lamb, Esquire, Attorney for Defendant Township

ORDER

AND NOW, this 27th day of March, 2003, upon consideration of the motion of defendant Bower for judgment on the pleadings and plaintiffs' response thereto, it is hereby ORDERED that the motion is GRANTED[1] and judgment is

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[1] [1]The relevant pleadings are plaintiffs' amended complaint, Bower's answer and new matter and plaintiffs' reply to new matter. Count III of the complaint has been voluntarily discontinued

entered in favor of defendant Bower and against plaintiffs, John J. Koresko, V., and Bonnie J. Koresko, in no amount.

BY THE COURT

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by plaintiffs. All of the remaining counts are based upon either the assertion that the plaintiffs have acquired an easement over defendant's property for trees roots emanating from trees on plaintiffs' property or that the subdivision process was flawed. To some extent, the claim based upon a flawed subdivision process are dependent upon the claim for an easement for tree roots. We incorporate herein by reference footnotes 1 and 2 to our order of December 4, 2002, which are dispositive of this motion as well.

IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA

NO. 01-05343

CIVIL ACTION-EQUITY

JOHN J. KORESKO, V., et al

Plaintiffs

VS.

MARK FARLEY, et al

Defendants

OPINION

Plaintiffs have filed an appeal from our orders of December 4, 2002, December 18, 2002, and March 28, 2002. Pursuant to Pa. R. A. P. No. 1925(a), we herewith file this brief statement in the form of an opinion of the reasons for our order. We note that the reasons are substantially set forth in the footnotes to the orders from which this appeal has been taken.

Following the filing of the appeal, plaintiffs were directed to file a concise statement of the matters complained of. The statement filed in response to that order can by no stretch of the imagination be deemed to be concise nor does it set forth in any useful and easily understandable manner the bases

upon which plaintiffs rely in this appeal. The first statement filed by plaintiffs consisted of five pages and fourteen numbered paragraphs, four of which had subparagraphs. But apparently this statement was, in spite of its length, still incomplete and plaintiffs filed an amended statement which added four subparagraphs to paragraph eleven of the original statement. "The purpose of the Pa. R. A. P. 1925(b) statement is to specify the particular issues which appellant intends to present on appeal in order to permit the trial court an opportunity to provide the appellate court with a focused and meaningful explanation for any challenged actions in its Pa. R. A. P. 1925(a) opinion." Commonwealth v Osteen, 381 Pa. Super. 120, 552 A. 2d 1124 (1989). In our view, the statement filed by plaintiffs is the functional equivalent of no statement at all and should be deemed to have waived all issues on appeal. If no statement is filed or a statement is not timely filed, "no issue is preserved for appellate review." Bryant v. Glazier Supermarkets, Inc., 2003 PA Super 130, 823 A. 2d 154(2003). We see no difference between no statement at all and one so prolix that it actually hinders the trial judge rather than aiding the judge in writing a focused opinion.

In their statement, plaintiffs claim that we applied an erroneous standard of review. We did not. We accepted as true as well pled facts as established by the pleadings and we did not go beyond those facts. We specifically stated in footnote 1 to our order of December 4,2002, that "Our review of the record does not go outside of the pleadings." Plaintiffs have offered no explanation of the manner in which they contend we considered facts other than those established by the pleadings.

Plaintiffs now argue that they should have been permitted to file another amended complaint. Plaintiffs had already filed multiple amended complaints and never suggested that any defect in the pleadings could be cured by amendment. They do not suggest now how and amended pleading would help their case. In fact, on the two main issues in the case, clearly plaintiffs have nothing more to say that is set forth in their final amended complaint.

Plaintiff's complaints were based on two main contentions. First, they contend that they have an easement over their neighbors' properties for the roots and branches of trees. The trees themselves are on the plaintiffs' own property. For the reason set fourth in our order of December 4, 2002, "we are satisfied that Pennsylvania does not and will not recognize and easement for tree roots and overhanging branches." Second, they contend that they have rights against the defendant Township arising from the subdivision process and the alleged failure of the Township to enforce its own subdivision procedures and ordinances. Again, we have set forth in the aforesaid order the reasons for our decision.

For the foregoing reasons and those reasons set forth in the orders here at issue, we entered the orders from which this appeal has been taken.

BY THE COURT:

_____

Date: July 5, 2003 J.

APPENDIX F – PETITION FOR ALLOWANCE OF APPEAL TO THE SUPREME COURT OF PENNSYLVANIA FROM THE ORDER OF THE COMMONWEALTH COURT AT NO. 1778 CD 2002

IN THE SUPREME COURT OF PENNSYLVANIA EASTERN DISTRICT

E.D. ALLOC. DOCKET 2004

JOHN J. KORESKO, :
Petitioners, : **COMMONWEALTH COURT EASTERN DISTRICT NO. 1778 EDA 2002**
v. :
:
MARK FARLEY, :
Respondents :
:

PETITION FOR ALLOWANCE OF APPEAL ON BEHALF OF PETITIONER JOHN J. KORESKO

ANDERSON KILL & OLICK, P.C.
Virginia I. Miller, Esquire
ATTY I.D. # 85361
1600 Market Street, 25th Floor
Philadelphia, PA 19103
(215) 568-4202

April 12, 2004

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I. OPINIONS DELIVERED IN THE COURTS BELOW

Petitioners respectfully seek to appeal the opinion of the Commonwealth Court is reported unofficially at *Koresko v. Farley, 2004 Pa.* Commw. LEXIS 203, 2003 WL 23318662 (March 10, 2004). A copy of the opinion is attached as Appendix A.

The opinion of the Court of Common Pleas of Chester County is not reported. A copy of the opinion is attached as Appendix B.

II. TEXT OF THE ORDERS IN QUESTION

The Commonwealth Court did not issue a separate order. The three orders of the Court of Common Pleas of Chester County under appeal are attached as Appendix C.

III. QUESTIONS PRESENTED FOR REVIEW

1. Whether the Commonwealth Court erred by holding, in direct contradiction to prior appellate decisions, that adjoining landowners lack standing to sue when the adjoining landowners (a) received no prior notice of a subdivision plan, and (c) demand compliance with Township ordinances which were enacted to protect of their health and property?

2. Whether the Commonwealth Court erred in ruling, contrary to this Court's precedent, that Plaintiffs/Appellants should not be allowed to amend the complaint, wherein the lower court calls into question the factual sufficiency making assumptions about the difficulty of proving facts, and the Commonwealth Court even stated that certain claims were "undeveloped"?

3. Whether the Commonwealth Court erred as a matter of first impression that, in direct contradiction to the Rules of Professional Conduct governing attorney conflicts of interest and this Court's interpretation of mandatory disqualification, that a court can defer a ruling on a motion to disqualify and defer ruling thus ignoring the conflict without a record because the court ultimately decides the outcome of the litigation, including pursuant to motions filed after the motion to disqualify, against the client who claimed the conflict?

IV. STATEMENT OF THE CASE

John Koresko and Bonnie Koresko (collectively "Neighbors) appeal from Orders of the lower courts that allow them no means to: 1) receive just compensation or project their property, ancient boundary trees, roots, and branches, from damage caused by development activity on adjoining real estate; and 2) complain about the lack of enforcement of subdivision plans and municipal ordinances. Petitioner joins in the Petition filed by Petitioner Bonnie J. Koresko and raises certain additional arguments for appeal, including whether the: 1) the Neighbors had standing. 2) the Commonwealth Court should have reversed the lower court and allowed amendment; and 3) the Commonwealth Court's decision allowing disqualification issues to be moot is against the rules and this Court's prior rulings.

A. Statement of the facts of underlying action

The Neighbors owned a property next to Defendant Bower. (Am. Compl. ¶ 10-12, R. 724a). Along the boundary between the two properties were many mature trees, all more than 21 years old. (Am. Compl. ¶ 20-21, R. 725a).

The boundary trees were on the Neighbors' property; but their roots and branches grew over onto the Bower property. (Am. Compl. ¶ 65-67, R. 729a-730a). On or about late 1999, Bower agreed to sell the 1175-1185 property ("1185 Property) to the developer Mark Farley and his controlled entities [Bryn Mawr Custom Home, Inc. and Seaton Ross, L.P.] (the "Developer"). (Am. Compl. ¶ 10, R. 724a). The Developer, acting as an agent for Bower, filed a subdivision plan for the 1185 Property (the "Subdivision Plan"). (Am. Compl. ¶ 13, R. 724a). The subdivision plan failed to list certain easements and other affected property rights of the adjoining landowners. (Am. Compl. ¶ 22, R. 725a). The Subdivision Plan contained material misrepresentations and omitted many features of the land as required by the ordinances. (Am. Compl. ¶ 21-25, 74-79, R. 730a-731a). The Subdivision Plan was improperly approved without notice to the adjoining affected landowners, the Neighbor. (Am. Compl. ¶ 14, R. 724a). On June 4, 2000, upon constructive notice of the Subdivision Plan and less than 10 days after issuance of building permits, the Neighbors protested the subdivision and building permits. (Am. Compl. Ex. "A", R. 737a-738a). In a letter, the Township Solicator Pompo told the Neighbors that they had no rights to stop or even question the construction. The Neighbors were left with no option but to pursue litigation against Tredyffrin Township, the Developer, Ollie Bower (the former owner), and Mr. and Mrs. Stephan Kay and Mr. and Mrs. Robert Grupp (the new owners of houses built on the site.) Despite being on notice, the Township refused to take action. (Am. Compl. ¶¶26, 42, 44, R. 725a-727a). The Developer also trespassed onto the Neighbors property and damaged the Neighbors' property and trees.

(Am. Compl. ¶ 56, R. 729a). The Developer unlawfully installed propane tanks on the 1185 Property in the setback area adjoining the Neighbors' property counter to ordinances and without the necessary permits as required by the Township. (Am. Compl. ¶ 34-41, R. 727a). The Developer wrongfully removed several trees from the 1185 Property counter to the express provisions of the subdivision Plan. (Am. Compl. ¶¶ 43-47, R. 727a-728a). The Developer blatantly failed to follow the Subdivision Plan as filed and approved with the Township. (Am. Compl. ¶¶ 43-47, 86-87, R. 727a-728a, R. 732a).

B. **Lamb, Windle & McEarlane, P.C. represented the Neighbors in prior and related actions.**

1. The LAMB Firm represented Petitioner in the Collection Action, which involved the same piece of property and the Developer.

On July 17, 2000, Petitioner John J. Koresko, V. (hereinafter "Koresko"), as sole shareholder of Koresko & Associates, P.C. initiated an action in the Court of Common Pleas, Chester County, Pennsylvania, against Mark Farley captioned, Koresko & Associates, P.C. v. Mark Farley (hereinafter the "Collection Action"), which asserted causes of action relating to the indexing of a judgment against Mark Farley and execution upon the 1185 Property. Among the disputes in the Collection Action was the fraudulent conveyance and title transfer of the 1185 Property. Judge Shenkin, the same trial court judge in this Action, was the assigned judge in the Collection Matter. (Docket Entries, R. 39a-48a; Mot. Mem.

Disqualify, R. 1269a-1320a; Suppl., R. 1640a-1623a; 2 Koresko Aff., R. 1602a-1609a).

In late May or early June 2001, Koresko retained Lamb, Windle & McEarlene, P.C. (hereinafter the LAMB Firm") to serve as co-counsel in the Collection Action. (Miller Aff., R. 1289a; Koresko Affs., R. 1603a). On June 21, 2001, the LAMB Firm entered its appearance on behalf of Koresko, and appeared at a hearing in the Collection Action on behalf of Koresko. (R. 1288a-1289a). As part of the LAMB Firm's representation of Koresko in the Collection Action, attorneys at the LAMB Firm were privy to confidental attorney/client communications relating to the 1185 Property and the Collection Action. (Miller Aff., R. 1289a; Koresko Affs., R. 1603a.) The Collection Action is still pending. (Docket Entries, R. 48a). Koresko employed Mr. Lamb and the LAMB Firm as local counsel for this action in Chester County, and prior to any construction, began *executive against the same adjoining parcel.* Joel Frank, Esquire, of the LAMB Firm entered his appearance for Mr. Koresko. Judge Robert Shenkin presided over that matter and stayed execution upon the Developer's posting of a $50,000 bond. (Id.)

The LAMB Firm knew that their co-counsel in the Collection Action, Virginia Miller, Esquire, is a Major in a Special Operations Combat C130 Air National Guard unit that is subject to immediate deployment at any time. If attorney Miller was called to active duty, the LAMB Firm would serve as primary counsel in the Collection Action. (Id.). This back-up became essential after the events of September 11, 2001. (Id.). Since September 11, 2001, attorney Miller deployed twice to an overseas combat zone and spent over

100 days on active duty in support of Enduring Freedom. (Id.)

2. Prior to filling this action, Koresko gives limited waiver to LAMB Firm based upon Lamb's promises, including to not take an adverisial position.

Knowing that the Township would be a defendant in this Action, and aware that the LAMB Firm was privy to confidental information in the Collection Action concerning the 1185 Property, Koresko sought a meeting with the LAMB Firm's possible representation of the Township in that action. (Miller Aff., R. 1290a). On or around June 25, 2001, a meeting took place at the offices of the LAMB Firm, that included attorneys William H. Lamb and Vince Pompo from the LAMB Firm, Virginia Miller, and Koresko who participated via telephone. (Id.). At the June 25, 2001 meeting, Koresko and Attorney Miller were advised by the LAMB Firm that LAMB Firm would be representing the Township in this Action. (Id.). Koresko raised the issue of the potential conflict of interest in the LAMB Firm's representation of an adverse party (the Township) while representing Koresko in the Collection Action. Koresko sought, and received assurances from the LAMB Firm that the Township would take only a passive role in the disputes which are the subject of this Action, would take no action against the interests of Koresko in this Action, and that the Township would not issue any new permits relating to the 1185 Property. (Id.).

At the June 25, 2001 meeting, Koresko agreed, that he would, based upon Lamb's promises, waive the conflict in the LAMB Firm's representation of Koresko in the Collec

tion Action, and the Township in this Action, as long as no actions were taken by the LAMB Firm and the Township in this Action that would be adverse to the interests of Koresko. (R. 1291a).

C. **Form the Action and Procedural History**

1. Neighbors file letter with Township to no avail. Several months after the Subdivision Plan had been approved for the adjoining parcel, Neighbors discovered that the Developer was about to begin construction of houses. (Am. Compl. Ex. "A", R. 737a-738a). Neighbors received no notice of the pending Subdivision and the Tredyffrin Township ordinances required none. (Id.). Neighbors contacted the Township and the Township's Solicitor Vincent Pompo, Esquire, of Lamb, Windle & McErlane, P.C. (now Lamb McErlane, P.C., and referred to herein as the "LAMB Firm"). (Id.). Neighbors asked Mr. Pompo and the Township to stop the construction. That request was denied. (Id.). In a letter, the Township Solicitor Pompo of the LAMB Firm told the Neighbors that they had no rights to stop or even question the construction.

2. After the Township refuses to act, the Neighbors filed a complaint in the Court of Common Pleas of Chester County (Shenkin, J.), against: Tredyffrin Township, the Developer, Ollie Bower, the Kayes and the Grupps, seeking various forms of equitable relief and/or damages. The pleadings reflected causes of action for trespass, interference with easement, violations of constitutional rights to due process, unlawful taking, violations of the subdivision ordinance, relief under 42 U.S.C. § 1938 et seq. and other

appropriate equitable relief to prevent further damage, obtain restitution, and to remove the offending uses. (Compl., R. 543a-557a). The Neighbors requested 1) injunctive relief as to enjoin any further construction or improvements that interfere with the Neighbors' property rights, 2) restitution regarding damage to the Neighbors' property 3) that defendants be ordered to file a new subdivision plan as the prior plan intentionally or negligently withheld material information that affected the Neighbors' right to due process and resulted in a taking of property without hearing, 4) that defendants be ordered to repair the Neighbors' property and to restore the Neighbors' property to the original condition, 5) that defendants be ordered to pay attorney's fees and costs, and 6) order any other relief as necessary and appropriate. (Id.).

3. The LAMB Firm changes mind about neutrality and then takes actions directly counter to its client Koresko.

About a year into the litigation, Lamb apparently changed his mind about neutrality. The Township suddenly began taking an adverse position to the Neighbors.

In August, 2002, however, it became apparent that the Township, and more egregiously, the LAMB Firm, were taking actions directly against the interest of Koresko, and contray to the agreements reached on June 25, 2001, including:

a. At a deposition on August 5, 2002, the Township revealed that in May 2002, Farley requested permits for the 1185 Property, various correspondence ensued,, and that the Township had issued permits relating to the re

moval/relocation of the propane tanks, and the tanks had been relocated. Despite the fact that this issue is central to the dispute in this Action, the Township issued the permit in violation of the agreement made by the LAMB Firm, and failed to disclose this information to Neighbors. (Id.).

b. That contrary to the agreement reached on June 25, 2001, that the LAMB Firm and the Township would take no action in this Action adverse to the interests of Koresko, it became apparent that the LAMB Firm was, in coordination with counsel for Developer, determining whether clearly relevant documents should be produced to Koresko. (Id.).

4. The LAMB Firm refuses to withdraw, threatens its client Koresko with a *Dragonetti* action, and drops Koresko like a hot potato.

If there was any doubt as to the newly revealed adversarial relationship between the Township and Koresko, it was eliminated when on August 7, 2002, William H. Lamb, Esquire, of the LAMB Firm forwarded a letter to Koresko enclosing the Township's Answer to the Amended Complaint, and advising that Lamb believed the Amended Complaint as it relates to the Township was a frivolous lawsuit, and Lamb threatened a *Dragonetti* action. (R. 1292a); (See letter of Aug. 7, 2002, Miller Aff., Ex. "5", R. 1307a- 1308a). In response, Koresko wrote to the LAMB Firm taking exception to Lamb's characterizations of the causes of action in the Action, setting forth the legal basis for the claims against the Township, and advising that the actions of the LAMB Firm were in conflict with the agreement reached on June 25, 2001. Because the LAMB Firm was representing the Town

ship in an action that was now directly adverse to the interests of Koresko, while continuing to represent Koresko in the Collection Action, Koresko asked the LAMB Firm to withdraw as counsel for the Township in the Action. (See letter of Aug. 8, 2002, Miller Aff., Ex. "6", R. 1310a-1311a). Given Lamb's abdication of neutrality, and the unmistakably adverse action against his clients, Koresko asked Lamb to resign from his representation of the Township in accordance with the Rules of Professional Conduct.

Lamb refused and instead caused the LAMB Firm to terminate its representation of Mr. Koresko's interests in the other case against the Developer. (See letter of Aug. 8, 2002, Miller Aff., Ex. "6", R. 1310a-1311a); (See letter of Aug. 12, 2002, Miller Aff., Ex. "7", R. 1313a).

On August 12, 2002, Koresko wrote to the LAMB Firm and took issue with its attempt to resolve the conflict by withdrawing from the Collection Action. (See letter of Aug. 12, 2002, Miller Aff., Ex. "8", R. 1315a- 1316a). On August 12, 2002, the LAMB Firm wrote to Koresko enclosing its withdraw was necessitated because a "dispute has arisen" between Koresko and the LAMB Firm. (See letter of Aug 12, 2002, Miller Aff., Ex. "9", R. 1318a). Tellingly, on August 14, 2002, the LAMB Firm in further response to Koresko's August 12, 2002 letter, stated that its decision to drop Koresko as opposed to the Township was motivated by its long relationship with the Township versus representing Koresko in a "very small matter". (See letter of Aug 14, 2002, Miller Aff., Ex. "10", R. 1320a).

5. The Neighbors file a Motion to Disqualify the LAMB Firm but the Court of Common Pleas does not conduct an evidentiary hearing and does not rule on the motion to disqualify until after ruling on other motions, including those filed after the motion to disqualify.

As soon as it became apparent that the LAMB Firm had reneged on its neutral stance and in fact was refusing to enforce its own ordinances, Neighbors moved the Common Pleas Court to disqualify the LAMB Firm. (R. 1269a-1320a). Koresko submitted an affidavit in support of disqualification, stating he had discussed with Attorneys Lamb and Frank sensitive matters related to the litigation against the Township which would not have been revealed had Koresko known they would become adversaries. (R. 1269a - R. 1320a; R. 1526a – R. 1527a; R. 1610a – R.1623a). Judge Shenkin *never conducted an evidentiary hearing, and never demanded or received from the LAMB Firm any written fee agreement.*

6. The lower court refuses to allow amendment.

All of the defendants filed "motions for partial judgement on the pleadings" (collectively herein "Defendants' Motions"). (R. 1a-26a). Defendants' Motions were all virtually identical, and asserted that the defendants were entitled to judgments on all counts of the Amended Complaint with the exeception of Count III, which alleged trespass. Neighbors responded by arguing that Judge Shenkin could not grant that motion because the Complaint stated valid causes of action and he was bound to construe all facts and inferences in fa

vor of plaintiffs. In the alternative, Neighbors requested leave to amend the Complaint. (R. 1344a; 1345a; R. 1489a).

Although Neighbors had amended their complaint only once before, Judge Shenkin refused to grant Neighbors' request to allow amendment of the complaint to cure any defects in pleading. (R. 28a-35a; 1344a; R. 1345a; 1358a; R. 1489a). Interestingly, even though the First Amended Complaint alleged the presence of the propane tanks in violation of Township ordinances, that the Township had ordered removed after the filing of the First Amended Complaint, the Judge, in ruling on the Judgment on the Pleadings, refused to allow the Neighbors to amend the First Amended Complaint but took notice of facts not in the First Amended Complaint – that the propane tanks had been removed and moved by order of the Township. (Id.). The Judge concluded, without asking for any evidence, that Neighbors could allege no facts to state a cause of action on account of the damage to the trees or any damage by now moved propane tanks. (Id.). He then issued three orders to dispose of the matters. Order 1 granted defendants' motions for judgment on the pleadings. (Id.). Regarding the motion to disqualify (even though the motion to disqualify after the judgment on the pleadings and stated: "...motions are DENIED as moot, although we note that if we had reached the merits of the motions, they would have been denied as being without merits of the motions, they would have been denied as being without merit." (Id. At 4).

Order 2 denied the Neighbors' motion for summary judgment, although the court offered to make a transfer to the law side of the court if money damages were sought for a small

part of one remaining count. (Id.). Neighbors asked Shenkin to certify Orders 1 and 2 for appeal, but the Judge refused. Left with only a trespass count against the Developer and the Former and Present Owners (limited, according to the court, to the damages for unauthorized removal of two smaller trees), the Neighbors voluntarily dismissed it enabling the trial court to enter Order 3 as a final judgment and facilitate appeal.

The Neighbors appealed all three Orders. (App. A). The Commonwealth Court called this matter "a case of first impression" but affirmed Judge Shenkin's decision that an easement cannot arise from encroaching tree roots or branches. (Id.). Further, the Court held that Neighbors had no standing to sue. (Id.). The Commonwealth Court found Judge Shenkin's refusal to allow amendment within the bounds of his discretion. (Id.). The Court stated in the last footnote to its Opinion that the lower court was correct in not disqualifying the LAMB Firm, since the causes of action alleged by Neighbors were ultimately decided against them; and, therefore, the disqualification issue raised below prior to the decision on the merits was moot. (Id.).

The Tredyffrin Ordinances and the attitude of the Township's administrators remain unchanged on the points at issues before this Court. The trees are dying. The Developer has his money. The Neighbors have no apparent remedy in the event the lower courts are not reversed. The current rule in the Commonwealth is that a lower court does not have to stop proceedings and hear a motion for disqualification but can table the hearing until the decision on other motions, in

cluding those filed after the motion for disqualification, and then rule that the motion for disqualification is moot.

V. REASONS FOR ALLOWANCE OF APPEAL

A. Summary

Additionally, the Commonwealth's decision that a landowner cannot enforce, in equity, ordinances and subdivision plans is counter to this Court's decisions and common sense. The question is what is a landowner to do when: 1) the adjoining landowner files a subdivision plan that contains material misrepresentations that affect the landowner and public rights that the subdivision rules are designed to protect; 2) after the subdivision plan is approved the adjoining landowner fails to follow the approved subdivision plan which injures the property rights of the landowner and public rights in general; 3) the adjoining landowner fails to follow Township ordinances which injuries the property rights of the landowner and public rights in general. 4) the adjoining landowner fails to acquire proper permits and variances for its misconduct; and 5) the landowner complains to the responsible Township, the Township refuses to enforce it ordinances, to enforce the filed subdivision plans, or to revoke a subdivision based upon material misrepresentations? If you ask the Commonwealth Court and the Township,-the only recourse is through the MPC – even though notice under the MPC is late and isn't it just too bad that the adjoining landowner did not receive notice of the subdivision pursuant to the MPC as the Township isn't required to give notice to adjoining landowners (even though the landowner has a constitutional right to notice before the taking of property rights)!

The Commonwealth Court's answer to the landowner's dilemma is TOUGH – no recourse – the Township can decide when, where, and for whom we will enforce our ordinances! Furthermore, if you take the Township to Court to enforce and get it to certain of its ordinances, on damages, costs, or fees are allowable. This Court should uphold its line of cases that hold that an adjoining landowner can bring such actions in equity. Furthermore, this Court should uphold a line of federal cases that state when a citizen's suit is the "catalyst" that results in compliance with a law, it is the "prevailing party" that is entitled to damages, even nominal damages, and statutory awards of attorney fees.

The trail court, instead of dismissing the complaint for failure to state a claim, should have allowed the Neighbors to amend their complaint to add more depth to the factual allegations. The Commonwealth Court erred in not reversing the lower court wherein even the Commonwealth Court had noted that amendments should normally not be denied absent prejudice, surprise, or where futile. The Commonwealth Court also noted that certain causes of actions were undeveloped. Furthermore, the removal of the propane tanks – which the lower court and Commonwealth Court both relied upon – happened after the filing of the complaint in granting judgment on the pleadings. The Commonwealth Court's ruling was directly contradictory to this Court's ruling that where a complaint fails to state a cause of action, it is usually error to dismiss the complaint without leave to amend. *Otto v. America Mut. Ins. Co.*, 482 Pa. 202, 393 A.2d 450 (1978).

The lower courts erred in not immediately disqualifying the LAMB Firm from representing the Township in this ac

tion when: 1) the conflict was raised by Koresko; 2) the matters were clearly adverse; 3) the LAMB Firm violated the consent agreement for representation of the Township; and 4) the matters involved substantially similar issues, namely the 1185 Property, as to demonstrate that confidences were shared. The trial court made no findings of fact and merely stated that the matter was without merit. This Court should overrule the holdings of the lower courts and make clear that a lawyer's conflict of interest is to be resolved by a trial court at the point it is raised, with an evidentiary hearing and record, and not defer or ignore the conflict without a record if the Court ultimately decides the merits of the litigation against the client who claimed the conflict. The Commonwealth Court erroneously agreed with the Common Pleas Court that a lawyer with an apparent conflict of interest, who acts as a Solicitor for a Township in the matter adverse to his client, who fails to obtain an agreement for adverse representation from his non-Township client, who drops his non-Township client and then litigates a matter to conclusion for the Township to the detriment of his former client, has no improper conflict of interest under the Rules of Professional Conduct.

VI. THE NEIGHBORS, AS ADJOINING LANDOWNERS MOST LIKELY TO BE HARMED, HAD STANDING TO ENFORCE PROVISIONS OF THE SUBDIVISION PLAN AND COMPLAIN ABOUT VIOLATIONS OF RESTRICTIONS AND ORDINANCES.

The trial court held that the Municipalities Planning Code ("MPC") barred the Neighbors from bringing suit, even though Neighbors received no notice of the subdivision plan

filed by the Developer and Former Owner. The Commonwealth Court's disagreed with the Neighbors' right to pursue an action. The Commonwealth Court's decision is indirect contradiction to this Court's decisions interpreting the MPC and the constitutional underpinnings.

Although Section 617 of the MPC, 53 P.S. § 10617, established a cause of action for any owner of real property who shows that his or her property or person will be substantially affected by the violation of an ordinance, and that this Court held three years after enactment of § 10617 that an adjacent property owner "as an aggrieved neighbor, had an independent right to seek relief from a zoning violation next door and that right could be asserted in an equity action. "*Fyre v. City of Monongahela,* 526 Pa. 170, 584 A.2d 946 (1991); *see also Peden v. Gambone Bros. Dev. Co.*, 798 A.2d 305 (Pa. Commw. Ct.), alloc. denied, 596 Pa. 726, 806 A.2d. 864 (2002) (adjacent landowners can sue in equity to compel compliance with zoning ordinance requiring a natural buffer), the Commonwealth Court held that the Neighbors lacked standing. The Commonwealth Court held that Neighbors could not complain that the Developer failed to list the dripline and location of their trees on boundary trees on the subdivision plan, since the Court said the trees were not entitled to protection. Secondly, the Commonwealth Court stated that the Neighbors had no right to complain that the Developer violated the subdivision plan by removing mature trees that were supposed to be retained because Neighbors had no standing. Further, the Court said that the Township's eventual enforcement of setback requirements, on account of Developer's illegal placement of underground

propane tanks, rendered Neighbors' action moot with no entitlement to compensation.

A. **Neighbors had standing under decisions of this Court and the United States Supreme Court.**

The law protects the branches and roots of Neighbors' trees from Developers and others, see part I, above so Neighbors were entitled to relief.

On the issue to enforce the plan and complain about violations of ordinances and removal of mature trees, the Commonwealth Court attempted to distinguish this case from its decision in *Doylestown Township v. Teeling*, 160 Pa. Commw. 397, 653 A.2d. 657 (1993), *alloc. denied*, 539 Pa. 697, 653 A.2d. 1234 (1994). While it is true that a note or restriction on a subdivision plan "is a covenant running with the land which could be enforced in equity by a purchase of a lot in the subdivision," the Court "reject[ed] Neighbors' suggestion that every detail on a subdivision plan creates a covenant which may be enforced by anyone." The Commonwealth Court relied on this Court's holding in *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d. 269 (1975), and claimed that Neighbors' pled only a generalized citizen's interest and not an individualized injury.

As argued previously, the Commonwealth Court ignored two fundamental constitutional rights that Neighbors were entitled to enforce. Neighbors had a right to except that the Township would do its duty and enforce its own ordinances. Neighbors also had a right to except that the Township would comply with its Constitutionally imposed duty to pro

tect natural resources, including trees, for the good of the public. Under the Commonwealth Court's analysis, although citizens are the intended beneficiaries of Article 1, section 27 of the Pennsylvania Constitution, nobody has a remedy. This certainly deviates from the jurisprudence of the United States Supreme Court, which has consistently held that where the government assumes duties equivalent to that of trustee, the intended beneficiaries of that "public trust" have standing to sue. At the very least, the most directly affected beneficiaries must have standing to sue or the constitutional provision are meaningless. *United States v. White Mountain Apache Tribe,* 537 U.S. 465, (2003): *United States v. Mitchell,* 463 U.S. 206, 224 (1983). *Seminole Nation v. United States,* 316 U.S. 286 (1942).

In William Penn, this Court stated the general rule that standing requires a plaintiff to have a substantial, direct, and immediate interest in the outcome of litigation. In South Whitehall Township Police Service v. South Whitehall Township, 521 Pa. 82, 555 A.2d 793, (1989), this Court explained:

A "substantial" interest is an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law. A "direct" interest requires a showing that the matter complained of caused harm to the party's interest. An "immediate" interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it, and is shown where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or constitutional guarantee in question.

Id. at 86-87, 555 A.2d at 795 (citations omitted).

However, this general rule is not without exception. In Faden v. Philadelphia Housing Authority, 424 Pa. 273, 227 A.2d. 619 (1967), and Application of Biester, 487 Pa. 438, 409 A.2d. 848 (1979), this Court found standing when the degree of casual connection is small but judicial review is necessary to protect against governmental action which otherwise would go unchallenged. See Sprague v. Casey, 520 Pa. 38, 550 A.2d 184 (1988) (granting standing to a taxpayer to challenge the constitutionality of a proposed judicial election scheduled for November of 1988). The Commonwealth Court never considered this exception. Neighbors qualify because the governmental action and inaction at the heart of this case would otherwise go unchallenged.

Notwithstanding, Neighbors satisfied each of the William Penn tests. As adjoining landowners, Neighbors were the parties most likely to be harmed by violations of plan provisions and ordinances. Moreover, adjoining landowners are more likely to have a direct aesthetic interest in the beauty of trees next door that are illegally cut down. Neighbors' interest in the construction contemplated by the subdivision plan and violations of ordinances exceeded those of any other citizen, so their interest was substantial. Neighbors' interest is direct because Neighbors alleged that the deviation from plans and ordinances violated their constitutional rights. It is only common sense that the Township regulated the location of underground tanks and impervious cover to minimize potential damage to *adjoining property owners* from explosion, leakage, or other damage. Further, Neighbors' interest is immediate because they showed a causal connection between

the violation of the plan provisions and ordinances and conditions of subdivision are designed to prevent. *See Hydropress Envtl. Servs., Inc. v. Township of Upper Mount Bethel*, 836 A.2d. 912, 917 (2003). There is no reason to deny standing in a state court when the same allegations and injuries would confer standing in a federal court, especially when the complaint includes federal constitutional claims. *See Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000).

Finally, the Commonwealth Court's holding cannot be reconciled with this Court's decision in Doyle v. South Pittsburgh Water Co., 414 Pa. 199, 199 A.2d. 875 (1964) and its progeny. This case falls directly within the "orbit of harm" rule espoused by Justice Musmanno in Doyle: "[W]here a party to a contract assumes a duty to the other party to the contract, and it is foreseeable that a brench of that duty will cause injury to some third person not a party to the contract, the contracting party owes a duty to all those falling within the foreseeable orbit of risk of harm." Id. 414 at 207, 199 A.2d. at 878; see Prost v. Caldwell Store, Inc. 409 Pa. 421, 187 A.2d. 273 (1963); Restatement (Second) of Torts § 324 A. (1965). This duty was also recognized by this Coury in Bisson v. John B. Kelly, Inc., 314 Pa. 99, 170 A. 139 (1934):

> It is a primary social duty of every person to take thought and have a care lest his action result in injuries to others. This social duty the law recognizes and enforces, and for any injury resulting from any person's lack of elementary forethought, the law holds that person accountable."

Id. at 110, 170 A. at 143.

What is a subdivision plan and the notes thereon, if not some form of contract? If the Commonwealth Court is correct that a plan is a type of restrictive covenant, the plan is "more than a contract, but less than an easement." Smith and Boyer, Survey Of The Law Of Property, at 348 (West 1971). In Tredyffrin Township, however, grant of a building permit is subject to the Developer's express written promises on its application to comply with the plan and its restrictions, including all laws and ordinances, whether or not separately enumerated. See Complaint, Ex B; R. In this case, there is a unilateral contract by the Developer to comply with the plan and ordinances, subject to a condition subsequent -- Township's right to take away development rights if noncompliancce occurs. A personal contract exists, along with a voluntary covenant placed on the land, but the Commonwealth Court limited those who can be within the "orbit of harm" to only those persons who purchase lots from a subdivider. The Court's analysis may appear techinally sound, but ancient property law of equitable servitudes did not contemplate and additional express promise or the "orbit of harm" doctrine. Powell and Boyer, *Survey of the Law of Property*, at 376-77. The result does not stand up to an analysis in tort. The duty of the Developer and Township to Neighbors arises as a matter of law, not as a matter of privacy of estate. Regardless of roots, they had no right to take an action that would ultimately harm the trees. The analysis also does not survive the additional anomaly of Pennsylvania constitutional law that imposes affirmative duties on the Township as public trustee of the environment, something also missing at common law.

B. Standing is not lost by mootness.

The Commonwealth Court further ruled against precedent that any argument as to enforcement of an ordinance and standing there under was lost by mootness when the Township, under pressure, enforce certain ordinances causing the propane tanks to be removed. The Commonwealth Court's mootness holding regarding standing is counter to precedent.

An allegation of individualized injury to economic or aesthetic interest, gives rise to a citizen's standing to sue. *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC)*, Inc., 528 U.S. 167 (2000). The case does not become moot simply because a violator could be repeated or other violations may continue. Id. Even if an intervening event satisfies some of the plaintiff's concerns, the case is not moot if other consequences of defendants' actions remain. See Church of Scientology v. United States, 506 U.S. 9, 13 (1992); Gandera Indus., S.A. v. Block, 727 F.2d 1156, 1158 (D.C. Cir. 1984). Herein the violation and/or other violations can reoccur as to invoke these U.S. Supreme Court cases invoking standing.

C. Neighbors were "catalysts" as to warrant damages and fees.

Furthermore, when citizen's suit is the "catalyst" that results in compliance with a law, it is the "prevailing party" that is entitled to damages, even nominal damages, and statutory awards of attorney fees, especially when the case arises under the civil rights legislation, 42 USC§§ 1938, 1985, and 1988. See baumgartner v. Harrisburg Housing Autho., 21 F. 3d. 541, 546-550 (3rd Cir. 1994) constructing Farrar v.

Hobby, 506 U.S. 103 (1992) (§ 1988 claim; Farrar did not require rejection of the "catalyst" theory). In this case, Township would not have forced Developer to comply absent these legal proceeding. Neighbors were the "catalyst" and are entitled to at least their attorneys' fees as compensation. Based on the foregoing, Neighbors were entitled to judgment and the courts below erred.

VII. BY NOT ALLOWING THE NEIGHBORS TO AMEND THE COMPLAINT, THE COMMONWEALTH COURT RULED IN DIRECT CONTRADICTION OT THE COMMONWEALTH'S LIBERAL POLICY OF ALLOWING SUCH AMENDMENTS.

The lower court erred by not allowing amendment when requested. The Commonwealth Court by affirming is in direction contradiction to other Superior Court and Supreme Court holdings that: Pleadings may be amended at the discretion of the trial court after pleadings are closed, while a motion for judgment on the pleadings is pending, at trial, *after judgement*, or after an award has been made and *an appeal taken therefrom*." *Biglan v. Biglan*, 330 Pa. Super. 512, 479 A.2d. 1021, 1025-26 (1984). (emphasis supplied). Furthermore, amendments should be allowed with great liberality at any stage of the case. Puleo v. Broad Street Hosp., 267 Pa. Super 581, 407 A.2d. 394 (1979). In Puleo, the trial court allowed a party to amend its pleadings even after a judgment on the pleadings already had been entered. Id. Where a complaint fails to state a cause of action, it is usually error to dismiss the complaint without leave to amend. Otto v. American Mut. Ins. Co., 482 Pa. 202, 392 JA.2d. 450 (1978). While acknowledging that "(t)here may, of course, be cases

where it is clear that amendment is impossible and where to extend leave to amend would be futile, "the Court said that the right to amend "should not be withheld where there is some reasonable possibility that the amendment can be accomplished successfully." Id. at 205, 393 A.2d 451-52. In Seaman v. Tamaqua National Bank, 208 Pa. 124, 127, 124 A.2d. 323 (1924), the Court ruled that an ambiguous complaint does not justify throwing the plaintiff out of court "without affording him opportunity to make it clear." Carringer v. Taylor, 402 Pa. Super. 197, 207, 586 A.2d. 928, 933 (1990): Sejpal v. Corson, Mitchell, Tomhave & McKinley M.D.'S., Inc. 445 Pa. Super. 427, 665 A.2d. 1198 (1995).

In the present case, Appellants made several references to amending the complaint if more facts were required. (R. 1344a; R. 1345a; R. 1358a; R. 1489a). The record speaks for itself: "IV IN THE ALTERNATIVE, THE COURT SHOULD ALLOW THE PLAINTIFFS TO AMEND THE COMPLAINT." (R. 1358, 1503) and other specific requests to amend if needed. (R. 1344a: R. 1345a; R. 1489; R. 1763a). The lower court should have allowed the Neighbors to amend and this Court should find that it was an error to not allow amendment. See e.g. Otto v. American Mut. Ins. Co., 482 Pa. 202, 395 A.2d 450 (1978) (Where a complaint fails to state a cause of action, it is usually error to dismiss the complaint without leave to amend.). In fact, Neighbors devote a whole section to the alternative argument that "the court should allow plaintiffs to amend the complaint." (R. 1358a; R. 1503a). The lower court, instead of dismissing the complaint for failure to state a claim, should have allowed

the Neighbors to amend their complaint to add more depth to the factual allegations. Furthermore, enforcement of one of the ordinances, by removal of the propane tanks, raises further arguments as to what damages the Neighbors received. As the propane tanks were still in place when the Neighbors filed the complaint, the Neighbors could not predict facts that developed after the filing. When the trial court viewed these "new" facts outside the complaint, the court should have allowed the Neighbors to amend as a matter of right as to the record and any damages. Where a complaint fails to state a cause of actions, it is usually error to dismiss the complaint without leave to amend. Id. Despite the trial court's statement that the Neighbors filed multiple complaints and never requested amendment, Neighbors filed one Amended Complaint and their responses to the motions for partial judgment on the pleadings is full of Neighbors' alternative arguments to amend.

A. The Complaint pled an action in trespass or nuisance against all defendants for all the damage to the trees, not just the roots, and could have been further amended to so state.

In the Court below, Judge Shenkin preserved the Trespass count only against the Developer and only as to the allegations that two trees located on Neighbors' property had been cut down. This ruling was counter to Superior Court and this Court's precedent regarding claims in trespass and nuisance.

An action in nuisance lies when a person uses real property such that it adversely affects a Neighbor's real property. The nuisance need only arise on the first property. It is re

dressable in equity. However, when the nuisance becomes one of a continuing nature it is actionable in trespass. "It is settled that a court of equity will interfere to restrain by injunction a trespass of a permanent nature (citations omitted)." Trimble Services, Inc, v. Franchise Realty Interstate Corp., 445 Pa. 333, 342, 285 A.2d. 113, 117 (1971). However, monetary relief is the more apt remedy for a temporary trespass. Id. Although the equity court may consider cases with both equitable and legal relief, once plaintiff's case evolves to whether it was entitled to compensatory damages, the cases should be transferred to the law side of the court. Id.

In the present case, Neighbors protested the destruction of the roots on defendants' property resulting in damage and eventual death to trees on Neighbors' property. Neighbors also protested the use of the driveway over the root systems, both generally and to service the improperly placed propane tanks. Defendants were using their real property in a way that damaged Neighbors' trees. Trees are real property. Consequently, Neighbors adequately pled a cause of action in nuisance or trespass as to the Developer, Former Owner and Present Owners. Additionally, since Neighbors pled a conspiracy, that cause of action should not have been dismissed as to the Township. Judge Shenkin failed to read the Amended Complaint in the light most favorable to the Neighbors, and the Commonwealth Court failed to construe this as arbitrary and capricious. Those decisions should be reversed.

B. <u>As observed by the Commonwealth Court, the Complaint stated a cause of action in conspiracy to harm Neighbors' trees.</u>

In Part IV its Opinion, the Commonwealth Court observed that:

"Defendants sought judgment on the pleadings for Count V. Although they characterized the unlabeled count as a civil conspiracy claim, a challenge was raised to the underlying property right. The only applicable property right identified in the amended complaint is the easement for encroaching roots and branches. As discussed, no such property right exists."

This quotation shows the same limited point of view demonstrated by Judge Shenkin. Instead of looking at the Amended Complaint in the light most reasonable to the Plaintiffs, the Commonwealth Court simply accepted the Defendants' characterization. The Amended Complaint said "easement" in one place but said "other property rights" in another. For example, the Complaint said:

94. [Neighbors] have been deprived *of their property rights* without compensation or due process of law by actions of Defendants Farley and Bower in concert with Defendant Tredyffrin, its supervisors, employees, and agents, in violation of the Constitution of Pennsylvania and the United Stated of America and the applicable provisions of state and federal law.

95.[Neighbors] are entitled to equitable or legal relief in order to restore *their property rights* to the position existing

prior to [the] grant of the Subdivision or to be compensated through restitution for an unlawful taking.

(R. 732a). [Emphasis added].

As demonstrated by the discussion above regarding nuisance and trespass TO TREES, NOT ROOTS, it was error to conclude that no other property rights existed which could be the subject of civil conspiracy claim. The Commonwealth sued Musser and others, alleging that they had conspired to sell trees seedlings and transplants that were subjected to a conservation covenant in favor of the Commonwealth. The Commonwealth's case was dismissed on preliminary objections by the lower court. The High Court reversed, since the courts were required t accept as true "every material and relevant fact well-pleaded and every inference fairly deducible therefrom." This is the same standard that applies in evalution of judgment on the pleadings.

The Musser Court stated the law of conspiracy, whether civil or criminal:

It is well established, and sustained by abundant authority, that a conspiracy may be proven by circumstantial evidence. An explicit or formal agreement can seldom, if ever, be proved and it need not be, for proof of a partnership is almost invariably extracted from the circumstances that attend its activities. The joint assent of minds required to sustain a charge of conspiracy may be inferred from facts which establish... that the conspiracy had been formed. The picture of conspiracy as a meeting by twilight of a trio of sinister persons with pointed hats close together belongs to a darker age.

Musser, 394 Pa. as 210, 146 A.2d. at 716-17. (citations and internal quotations omitted).

"Now the least degree of concert or collusion between parties to an illegal transactions makes the act of one the act of all..." *Id.* Plaintiff is not required to present direct and positive testimony of a collusive agreement to do something unlawful. Id. at 210 – 211, 146 A.2d at 717 (citations omitted). Conspiracy can be proved by circumstantial evidence. *Id.*

The present case is a classic example of conspiracy by circumstantial evidence. There were obviously written agreements between the Developer and the Former Owner, the Township, and the New Owners. Those contemplated continuation of the nuisance and trespasses alleged. The Township had and apparent policy of not enforcing ordinances against Developers, especially the tree protection ordinance. Apparently, the Township accomplished the policy by agreements (orders) between the Township Manager and the Building Inspectors which were exposed by discovery. These facts and circumstances were all reasonably inferable from the Complaint and available at the time Judge Shenkin considered he motions below. The trial court's refusal to allow amendment resulted from arbitrary and capricious reading of the Complaint should not have been dismissed. If any facts were missing, the trial court should have allowed amendment.

The Neighbors pled violations of various statues. At common law, violations of laws give rise to actions in tort. *Pearl*

Assur. Co., v. National Ins. Agency, 150 Pa. Super. 265, 273-74, 28 A.2d 334, 338 (1942).

C. THE TRIAL COURT ERRED AS A MATTER OF LAW IN NOT DISQUALIFYING THE LAMB FIRM, WHEREIN THE LAMB FIRM HAD REPRESENTED PLAINTIFFS IN A RELATED MATTER.

This Court should overrule the holdings of the lower courts and make clear that a lawyer's conflict of interest is to be resolved by a trial court at the point it is raised, with an evidentiary hearing and record, and not defer and ignore, without a record, because the court might ultimately decide the outcome of the litigation against the client who claims the conflict. The rulings are counter to the Rules of Professional Conduct ("RPC") and to this Court's cases.

The Commonwealth Court erroneously agreed with the Common Pleas Court that a lawyer with an apparent conflict of interest, who acts as a Solicitor for a Township in the matter adverse to his client, who fails to obtain an agreement for adverse representation from his non-Township client, who drops his non-Township client,, who drops his non-Township client and then litigates a matter to conclusion for the Township to the detriment of his former client, has no improper conflict of interest under the Rules of Professional Conduct. The courts erred in not immediately disqualifying the LAMB Firm from representing the Township in this action when: 1) the conflict was raised by Koresko; 2) the matters were clearly adverse; 3) the LAMB Firm violated the consent agreement for representation of the Township; and 4) the matters involved substantially similar issues, namely

the 1185 Property, as to demonstrate that confidences were shared. The Neighbors raised these arguments in the lower court and presented affidavits. (R. 1269a – R. 1320a; R. 1562a – R. 1572a; R. 1610a – R. 1623). The lower court made no findings of fact and merely stated that the matter was moot and without merit after ruling on other motions.

The Commonwealth Court, in two footnotes, described the motion to disqualify in the briefest terms, and affirmed the decision of the Common Pleas court on the basis of mootness. The entire discussion of the Commonwealth Court consists of a few sentences:

N4. Neighbors filed on motion requesting the disqualification of the Township's attorney due of an asserted conflict of interest. They argued that the law firm representing the Township in this equity action, Lamb, Windle, & McErlane (Law Firm), simultaneously represented Neighbor John Koresko in a collection action against defendant Mark Farley. Neighbors' motion to disqualify was denied as moot.

Note 12 of Opinion is ambiguous in that it appears the Commonwealth Court affirmed the Common Pleas Court only the question of mootness, while implicitly acknowledging that there were grounds for disqualification.

The Commonwealth Pleas Court made no record concerning the disposition of the Motion, and never required the LAMB Firm to produce a written fee agreement, although the LAMB Firm gave an affidavit saying that their fee agreement allowed them withdraw from representation if a conflict arose with respect to their other client, Tredyffrin Township. The LAMB Firm never produced any said

agreement or written waiver. Although the conflict is described in the following paragraphs, Petitioners swore by Affidavit that no such agreement ever existed, that the subjects of the two litigations were the same as each concerned the same parcel of ground and the same defendant, and Petitioners shared confidences concerning their trial strategies with the LAMB Firm. Although the Court is bound by factual findings of the lower Court which have adequate support in record, in cases in which final order of a trial judge is called into question, the Court is not bound by lower court's conclusions of law, but rather, may draw its own conclusions from facts as established. *Triffin v. DiSalvo,* 434 Pa. Super. 326, 643 A.2d. 118 (1994), *alloc. denied,* 541 Pa. 627, 661 A.2d 874 (1995).

The grounds for disqualification of a lawyer: a) has never been subject to considerations of mootness; and b) should not be resolved after a conflicted has had the opportunity to litigate to conclusion a lawsuit to finality on the merits against a present or former client when the RPC require immediate consideration of disqualification.

The opinion of the Commonwealth Court is inconsistent with duty of loyalty imposed on attorneys and inconsistent with this Courts' precedent on mandatory disqualification. *Maritrans v. Pepper, Hamilton & Scheetz,* 529 Pa. 241, 253, 602 A.2d 1277, 1283 (1992); *Seifert v. Dumatic Industries Inc.,* 413 Pa. 395, 197 A.2d 454 (1964).

1. Pursuant to the Pennsylvania Rules Of Professional Conduct, and attorney cannot represent clients with interests that are adverse, and as such, the LAMB Firm's representation of Koresko and the Township could have only occurred if there was a waiver of the conflict.

Pennsylvania Rule of Professional Conduct 1.7(a) states:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client unless;
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.

42 Pa. Cons. Stat. Ann Rules of Prof'l Conduct 1.7(a).

Having agreed to the representation of Koresko in the Collectin Action, Rule 1.7 prohibits the LAMB Firm from representing any client that would be directly adverse to Koresko unless the LAMB Firm reasonably believed the new representation would not be adversarial to Koresko, and Koresko and the new client each consent after consultation. As such, the LAMB Firm could have only accepted the representation of the Township in this Action if the Township was not going to be adverse to Koresko, and if Koresko and the Township consented. Per the original meeting, Koresko received assurances that the Township would take only a passive role

and would take no actions against his interests in this Action. (R. 1618a).

As set forth, supra, Koresko gave said consent, but only conditionally, based upon certain assurances from the LAMB Firm, including an assurance that the Township and the LAMB Firm would not take any action adverse to the interests of Koresko. (R. 1617a – 1621a). As a result of the actions by the Township and the LAMB Firm that were disclosed in August, 2002, the LAMB Firm violated the conditions of Koresko the conditions of Koresko's waiver of the conflict. (R. 1619a – R. 1620a). No longer having the consent required by Rule 1.7(a)(2), and since the interests of the Township were now directly adverse to those of Koresko, the LAMB Firm's obligation was to withdraw as counsel.

Instead of withdrawing as counsel for the Township, but in apparent recognition of the conflict of interests, the LAMB Firm withdrew as counsel for Koresko in the Collection Action. However, "an attorney may not drop one client like a 'hot potato' in order to avoid a conflict with another, more remunerative client." *International Longshoreman's Ass'n, Local Union 1332 v. International Longshoreman's Ass'n* 909 F. Supp. 287, 293 (E.D. Pa. 1995). The fact that the decision as to which client would be dropped was based upon his considering the Collection Action " a very small matter" in comparison to his relationship with the Township. (See letter of Aug. 14, 2002, Miller Aff., Ex. "10", R. 1320a).

Obviously, the Rules of Professional Conduct do not provide that an attorney's decision as to which client he will

represent after a conflict arises can be based upon the size of the matter, or the years of service to a particular client. When a conflict arises after representation, whether a lawyer can continue to represent either of the clients is determined by Pennsylvania Rule of Professional Conduct 1.9. (*See* Comments to Rule 1.7). When Koresko withdrew his consent after the consent agreement had been breached, the LAMB Firm had no choice but to withdraw. The lower court abused its discretion by not disqualifying the LAMB Firm and forcing its withdrawal.

2. **The LAMB Firm's Refusal To Withdraw As Counsel For the Township In this Action Is In Violation Of Pennsylvania Rule Of Professional Conduct 1.9**

When the LAMB Firm withdrew as counsel for Koresko in the Collection Action, it did so in apparent recognition of the conflict of interests in its continued representation of Koresko in the Collection Action and the Township in this Action. The LAMB Firm's dropping of Koresko like a "hot potato" in an attempt to eliminate the conflict was inappropriate. However, having withdrawn from representation of Koresko, whether the LAMB Firm could continue to represent the Township in this Action is governed by Rule 1.9 Rule 1.9 state:

> A Lawyer who has formerly represented a client in a matter shall not
>
> (a) represent another person in the same or a substantially related matter in which that person's interest are materially adverse to the interest of the former client unless

the former client consents after a full disclosure of the circumstances and consultation: or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally knew.

42 Pa. Cons. Stat. Ann. Rules of Prof'l Conduct 1.9.

As such, whether the LAMB Firm could continue to represent the Township is a question of whether this Action is a "substantially related matter" in which the Township's interests are mutually adverse to Koresko's interests.[1] Since the interests of the Township are adverse to Koresko's in this Action, the only issues for determination is if this Action is a substantially related matter to the Collection Action. To determine whether the two actions are substantially related matters, the court examines the nature and scope of the representation in the action in which the attorney has withdrawn, the nature of the action against the former client might have disclosed confidences which could be relevant to the action against the former client might have disclosed confidences which could be relevant to the action against the former client. *Brennon v. Independence Blue Cross,* 949 F. Supp. 305 (E. D. Pa. 1996); *see e.g. Triffin,* 434 Pa. Super. at 326, 643 A.2d. at 118 "If the attorney 'might' have acquired confidental information relating to the subject matter of his subsequent representation, then Rule 1.9 would prevent the attorney from representing the second client. *Commonwealth Ins. Co. v. Graphix Hot Line, Inc.,* 808 F. Supp. 1200 (E.D. Pa. 1992), citing *Richardson v. Hamilton Int'l Corp.,*

469 F.2d 1382 (3d. Cir. 1972, *cert. denied,* 411 U.S. 986 (1973). Any doubts as to the existence of a violation of the rules should be resolved in favor of disqualification. *J & J Snack Foods Corp. v. Kaffrissen,* No 98-5743, 2000 WL 562736 (E.D. Pa. May 9, 2000).

As set forth in the Affidavit of Virginia Miller, both the Collection Action and this Action relate to the 1185 Property. (See Miller Aff., ¶ 3 and ¶ 10, R. 1288a – 1290a). Attorney Miller states in her Affidavit that as counsel for Koresko in the Collection Action, the LAMB Firm was privacy to confidential attorney/client information of a nature that could be utilized by the Township in this Action. Furthermore, Koresko specifically disclosed strategy and trial strategy of this Action with Lamb. (R. 1601a). As such, the Collection Action and this Action are substantially related matters, and pursuant to Rule 1.9, the LAMB Firm must withdraw as counsel for the Township in the Action.

Counsel is fully cognizant that a motion to disqualify opposing counsel is a serious matter. However, given the disclosure of confidential information to the LAMB Firm; information that both counsel and Koresko believe can be adverse to the interest of Koresko in this Action, and given the LAMB Firm's refusal to withdraw, counsel was left with no option but to file the motion. The lower court erred in not granting Neighbors' motion to disqualify the LAMB Firm. Absent factual findings by the lower court, this Court may review the facts and make their finding. This Court should disqualify the LAMB Firm.

VIII. CONCLUSION

For all the foregoing reasons, the Neighbors respectfully request that this Court grant this petition for allowance of appeal. Furthermore, the Neighbors respectfully request that this Court disqualify the LAMB Firm from further representation of the Township.

Respectfully submitted,

Dated: April 12, 2004

Virginia I. Miller (I.D. # 85361)
ANDERSON KILL & OLICK, P.C.
1600 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 568-4202

Attorneys for Petitioner

VERIFICATION

I, JOHN J. KORESKO, V, hereby verify that I am a Petitioner/Appellant and that the factual allegations in the foregoing PETITION FOR ALLOWANCE OF APPEAL are, to the best of my information and belief, true and correct. I understand that false statements made herein are subject to the penalties of set forth in 18 Pa. C.S.A § 4904.

Date: April 9, 2004

Respectfully submitted,

_____

John J. Koresko, V. (I.D. #42795)

APPENDIX G – AMENDED COMPLAINT IN EQUITY

KORESKO & ASSOCIATES, P.C.
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COURT OF COMMON PLEAS CHESTER COUNTY, PA

JOHN J. KORESKO, V and BONNIE J. KORESKO

v. Plaintiffs

MARK FARLEY, OLLIE BOWER, SEATON ROSS, L.P., a Limited Partnership, BRYN MAWR CUSTOM HOME, INC. General partner, TOWNSHIP OF TREDYFFRIN, STEPHEN D. KAYE

Defendants

AMENDED COMPLAINT IN EQUITY

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after the complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GOT TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Chester County Bar Association

Lawyer Referral and Information Service

15 West Gay Street

West Chester, PA 19380

(610) 429-1500

Plaintiffs, JOHN J. KORESKO, V and BONNIE J. KORESKO pursuant to Rules 1530, 1531 and 1533 of the Pennsylvania Rules of Civil Procedure, hereby bring an action in equity for special, preliminary and permanent injuctive relief against Defendants, and for restitution and other relief.

1. Plaintiffs ("Koresko") are individuals who reside at 1159 Seaton Ross Rd., Radnor, Tredyffrin Township, Chester County Pennsylvania and are the record owners of said property.

2. Defendant Mark Farley ("Farley") is an individual who had an address at 1175 to 1185 Seaton Ross Rd., Radnor, Tredyffrin Township, Chester County Pennsylvania ("the 1185 Property") and has an address at 1101 Montgomery Ave.

3. Defendant Seaton Ross. L.P. (" SRLP") is a Pennsylvania Limited Partnership shown as the record owner of 1175 to 1185 Seaton Ross Rd., Radnor, Tredyffrin Township, Chester County Pennsylvania (collectively "the 1185 Property") at the time of the filing of the original complaint, although Plaintiffs allege that Farley was the real owner.

4. Defendant Bryn Mawr Custom Home, Inc. ("BMCH") is a corporation formed by Defendant Farley to be general partner of Defendant Seaton Ross, L.P.

5. Defendant Farley is the limited partner of SRLP.

6. Defendant Tredyffrin Township ("Township") is a township of the second class located in Chester County whose supervisors, employees and agents took part in actions giving rise located in Chester, County, whose supervisors, employees and agents took part in actions giving rise to the causes of action noted herein. Township is a Home Rule Municipality.

7. Defendant Stephen D. Kaye and Diana S. Kaye ("Kayes") are husband and wife with an address at 1185 Seaton Ross Road, Radnor, PA 19087 and are the current record owners of said property.

8. Defendants Robert W. Grupp and Jan M. Grupp ("Grupp") are husband and wife with an address At 1175 Seaton Ross Road, Radnor, pA 19087 and are the record owners of said property.

9. SLRP, BMCH, and M.J. Farley Development Co., Inc. are sham corporations and alter ago of Farley.

10. In 1999, Individually or in conjunction with M.J. Farley Development Co., Inc., Farley entered into an agreement of sale to purchase the 1175-1185 Property from Defendant Ollie Bower, and in 2000 begun construction of two large houses.

11. The Plaintiffs' property shares a boundary with the 1185 property, as shown by the official Chester County tax map.

12. In December 1999, Bower filed a certain with the officials of Tredyffrin Township to subdivide the 1185 Property into two parcels(the "Subdivision").

13. On information and belief. Farley caused the Subdivision plans to be prepared, filed, and Processed pursuant to the procedures established by Tredyffrin.

14. No notice of the filing of the Subdivision was given to any adjoining landowner, including Plaintiffs.

15. The Tredyffrin Township Board of Supervisors approved the Subdivision in February 2000.

16. Following said approval, Ollie Bower signed the Subdivisors approved and caused it to be recorded by Township officials in the official records of Chester County.

17. The Subdivision called for the placement of a water line along the boundary between the 1185 Property and the Koresko property, which water line was intended to service a new house on the rear lot of the 1185 Property.

18. The Subdivision called for the construction of a driveway on the boundary of the 1185 Property and the Koresko property.

19. A private road existed on the opposite side of the 1185 Property that provided access to and could have been used as a driveway for the 1185 property.

20. Prior to the subdivision, several mature trees existed along said boundary ("boundary trees"), over 40 feet in height, the trunks of which grow on Koresko's property, and

the roots of which are beneath the surface on the 1185 Property.

21. Prior to the subdivision, the boundary trees, the boundary trees' roots, and the boundary trees' branches had been growing onto the 1185 property for at least 21 years.

22. Material representations regarding the boundary trees and other trees were omitted from the subdivision plan.

23. Tredyffrin Code See 181-39 requires a Natural Feature Conservation Plan. Furthermore, Section, 181-43 states "that every subdivision or land development plan shall be designed to preserve and protect the natural feature of the land, including existing...wetlands, large trees standing alone or in groves..."

24. The Subdivision and the subsequent building plans were accomplished by the same engineering service, RKW Engineering Services, specifically Robert K. Weger, P.E., 1610 Pelham Ave., Havertown, PA 19083.

25. Tredyffrin Township issued building permits to Farley (as contractor) for the construction of the houses on the 1185 Property on or about June, 1, 2000.

26. Pursuant to Subdivision and the building code applicable to the construction, Defendants intend to dig or have dug a trench along said boundary and into which the water line or other utilities have been or will be placed.

27. Plaintiff John Koresko protested the Township's issuance of the building permits, but the Township refused to

revoke them or otherwise interfere with the planned construction. (Ex. A).

28. On March 8 and March 11, 2000, Mark Farley signed certain agreements of sale with Ollie Bower. Although the purchaser was designated M.J. Farley Development Co., Inc. ("Development Co.") and/or assignees, the agreements were executed by Mark Farley with no designation of being an officer, director, partner, or agent of any entity.

29. .On April 21, 2000, Mark Farley executed an Application for Building Permit in Tredyffrin Township. Said Application lists Mark Farley (individually) as contractor, not Development Co. and also contains a certification signed by Farley that: "I am the owner of record of the named property or that the proposed work is authorized by the owner of record."(Ex. B).

30. On April 21, 2000, Mark Farley executed an application for Use and Occupancy Permit in Tredyffrin Township. Said Application lists Mark Farley (individually) as Applicant and also contains the following: "I hereby make application to occupy 1185 Seaton Ross Rd., Wayne, PA 19087 Lot #2, parcel 4307J0008, for use as Single Family Dwelling. Appliciant's Signature c/Mark J. Farley."

31. May 31, 2000, a Building Permit No. Tredyffrin issued C 6519 township with respect to the Property. The Permit lists Mark Farley individually, not Development Co. as the person to whom it is issued. (Ex. D).

32. On May 17, 2000, Mark Farley executed a Residental Building Sanitary Sewer Construction Application in Tredyf

frin Township. Said Application lists Mark Farly (individually) as Applicant and also contains the following statement: 1175 Seaton Ross Road, Wayne, PA 19087 Lot #2. parcel 4307J0008. owned by OLLIE BOWER/MARK FARLEY (Ex E.)

33. To date, Farley, SRLP, their agents or employees, have already constructed a driveway to the rear lot on the 1185 Property: and in so doing, excavated beneath the surface and damaged the root systems of trees on Koresko's property.

34. Construction on the 1185 Property included the addition of two 1,000 gallon filed with the Township.

35. The Propane tanks were not listed on any of the subdivision or building plans filed with the Township.

36. The Defendant did not attain any building permits for the propane tanks.

37. Upon information and belief, the installation of the propane tanks involved excavation of at least 6 feet.

38. The Propane tanks were installed within the setback areas of 1185 Property.

39. The Defendants never attained permission from the Township for the placement or Construction of the propane tanks.

40. At least one of the propane tanks is within 15 feet of the subject residence.

41. Servicing of the rear 1185 property propane tank involves continual use of the boundary driveway by a commercial vehicle in excess of two tons.

42. On information and belief, the completed and/or planned construction of the driveway, water line ditch, and other improvements have done harm and will continue to harm the root systems of numerous trees on Koresko's property.

43. Certain trees were required to be listed on the subdivision and building plans.

44. To date, Farley, SRLP, their agents or employees. (either personally or through their agents or subcontractors) have already wrongfully cut down at least two trees on Koresko's property and damaged others.)

45. Trees on the 1185 Property that were not listed for removal on the subdivision and building Plans were removed.

46. Defendant Farley, SRLP, their agents or employees were required to replace the removed trees with similar trees.

47. Defendant Farley, SRLP, their agents or employees replaced removed hardwood trees with either no trees or small pine trees.

48. Plaintiffs filed the original complaint on June 25, 2001.

49. One June 22, 2001, Plaintiffs made Defendants Mark Farley, Seaton Ross, L.P. and other interested parties (title /

company City Line Abstract and real estate agency Prudential Fox & Roach) formally aware of the impending lawsuit. All of these parties were faxed copies of the complaint with stated intentions that the complaint would be filed Monday June 25, 2001, at 301E. City Line Avenue, Suite 200, Bala Cynwd, Pennsylvania. Service was accepted by Terri L. Huffnagae, who started that she was authorized to accept service of the Complaint on behalf of City Line Abstract.

50. Interested Party, City Line Abstract was formally served on June 26, 2001, at 301 E. City Line Avenue, Suite 200, Bala Cynwyd, Pennsylvania. Service was ac cepted by Terri L. Huffnagae, who stated that she was authorized to accept service of the Complaint on behalf of City Line Abstract.

51. Upon information and belief, Prudential Fox & Roach was the real estate agency involved in the listing and sale of the 1185 Property.

52. Upon information and belief, City Line Abstract was the title company for the Sales of the 1185 Property.

53. Upon information and belief, Robert W. Grupp and Jan M. Grupp closed on the 1175 Seaton Ross Rd address on or about June 26, 2001.

54. Upon information and belief, Stephen D. Kaye and Diana S. Kaye closed on the 1185 Seaton Ross Rd address on or about June 29, 2001.

55. Upon information and belief, the Township of Tredyffrin issued use and occupancy permits to the Gupps and Kayes after filing of the complaint in the action.

56. On or about August 23, 2001, an agent of the Grupps left numerous materials for the installation of underground cables and wiring on the Koresko property.

57. Upon information and belief, the proposed installation of the underground cable and wiring involved excavation along the boundary of the 1185 Property and the Koresko property.

58. On or about December 14, 2001, the Grupps and/or an agent of the Grupps staked out certain portions of the 1185 properties that involve certain portions of the are that the Plaintiffs allege is part of the easement.

59. Upon information and belief, the Grupp and/or agents of the Grupps have entered without permission the Koresko property.

60. Upon information and belief, the Grupps and/or an agent of the Grupps intend to dig further trenches on or along the boundary of Plaintiffs' property for the installation of utilities and other improvements.

61. Upon information and belief, the use of the 1185 Property driveway will cause further harm to the Plaintiffs.

COUNT I

62. The allegations of the preceding paragraphs are incorporated by reference.

63. The Subdivision plan failed to note or display the existence of the trees in question along the common boundary between the Plaintiff's and Defendant's property.

64. Review of the subdivision plan by Chester County prompted notes from Chester County regarding the wooded areas and preservation of trees.

65. Prior to the subdivision, the branches and root systems of the trees in question have been growing on the 1185 Property for more than 21 years.

66. The branches and root systems of the trees have grown in an open and notorious manner for the benefit of the Koresko property, and in so doing, such branches and root systems have been hostile to the ownership of Farley, Bower, and other owners of the 1185 Property.

67. As a matter of law, the owners of the Koresko property have acquired an easement against the 1185 Property with respect to the root systems of trees and other foliage along the boundary line.

68. The construction of the contemplated water line, ditches, and other improvements within the area contemplated by the Subdivision plan Has damaged or will inevitably result in the damage to the branches and root systems Koresko's trees and will likely lead to the death or disease of such trees.

69. The trees, including branches and root systems, are unique creations of nature, which cannot be replicated in the exact manner in which they presently exist.

70. The construction of the water line, as well as other improvements on the Subdivision, have impaired and will impair the easements Koresko has acquired in fact and in la by express permission and by implication.

71. The Koresko property is again being threatened by the installation of more utilities and improvements across the Koresko property without notice or easement.

72. The law is clear that a landowner ahs a right to petition a court of equity to enjoin the interference with an easement or otherwise prevent waste against the property of an adjoining landowner.

COUNT II

73. The allegations of the preceding paragraphs are incorporated by reference.

74. Bower and Farley failed to completely list the existence of easement on the Subdivision.

75. Bower and Farley failed to display the existence of the trees on the boundary line so as to put the Township, its agents and employees on notice of the possibility of impairment of private property interest.

76. The Subdivision did not list proposed material improvements, including installation of propane tanks in the setback areas.

77. The Subdivision was defective as a matter of law.

78. Bower and Farley intentionally withheld material information from the Township, its Agents and employees.

79. Bower and Farley caused the Township, its agents and employees to approve said Subdivision under false pretenses and to deprive adjoining landowners of property rights without due process of law.

COUNT III

80. The preceding paragraphs are incorporated by reference.

81. Unique assets of Plaintiffs have been or will be damaged or destroyed by the actions of Defendants.

82. Farley, SRLP, and his agents have intentionally destroyed trees on Plaintiff's property and damaged roots of Plaintiff's.

83. Farley, SRLP and his agents have intentionally trespassed on the lands of Plaintiffs and damaged same by entering thereon without permission to trim/and or cut down Plaintiffs Trees.

84. Farley, SRLP, and his agents have intentionally trespassed on the lands of Plaintiffs and damaged same by entering thereon, excavating thereon, laying building materials

thereon, and placing asphalt thereon, the end of which in on Plaintiffs' property, all of which occurred in the absence of consent of the Plaintiffs.

85. The aforesaid acts have damaged Plaintiffs in an amount in excess of 50,000.

86. Farley, SRLP, and his agents have intentionally removed several mature trees from the 1185 Property, in con

tradiction to the express provision of the Subdivision whereby such trees were shown to be retained.

87. Farley, SRLP, and his agents excavated and installed propane tanks in the 1185 Property Setback area without express permission of the Township.

88. The aforesaid acts constitute a material departure from the Subdivision and a violation of the Ordinances of Tredyffrin Township.

89. The aforesaid acts have materially impaired Plaintiffs property.

COUNT IV

90. The allegations of the preceding paragraphs are incorporated by reference.

91 .Plaintiffs are entitled as a matter of law to have their trees, roots and property restored to the condition they existed in prior to the acts of Defendants complained of herein.

92. In the event the status quo cannot be restored, Plaintiffs are entitled to restitution in the amount necessary to make them whole.

COUNT V

93. The allegations of the preceding paragraphs are incorporated by reference.

94. Plaintiffs have been deprived their property rights without compensation or due process of law by the actions of Defendants Farley and Bower in concert with Defendant

Tredyffrin, its supervisiors, employees, and agents, in violation of the Constitution of Pennsylvania and the United State of America and the applicable provisions of state and federal law.

95. Plaintiffs are entitled to equitable or legal relief in order to restore their property rights to the position existing prior to grant of the Subdivision, or to be compensated through restitution for and unlawful taking.

COUNT VI

96. The allegations of the preceding paragraphs are incorporated by reference.

97. Defendants will suffer less harm than Plaintiffs if the Court enjoins the placement of the water utilites, propane tanks and other contemplated improvements on the Subdivision within the area of the roots of Plaintiff's trees, or orders them removed, since Defendants have the ability to refile a new Subdivision plan and place the improvements on a different section of the 1185 property

98. The detriment to Plaintiffs by not granting the injunctive relief requested herein is far Greater because of the possibility that unique assets will be further damaged or destroyed, the clear right to Plaintiffs to protect their easements and other property interests, and the demonstrated conduct of Farley and SRLP, its partners, agents and employees in destroying trees and damaging roots, which occurred in the absence of Court intervention.

99. The public interest in served by granting the injunction because a) the public as a whole benefits from mature trees; and b) since no notice of the Subdivision was given, the Township apparently never received input from neighbors regarding the deleterious impact the Subdivision would have on adjoining landowners.

100. Plaintiffs have been deprived its property rights without compensation or due process of law by the actions of Defendants Farley and Bower in concert with Defendant Treddyffrin in violation of the Constitution of Pennsylvania and the United States of America.

101. No bond is appropriate under there circumstances. Plaintiffs have no adequate remedy at law.

WHEREFORE, Plaintiff request that this Honorable Court

1. Grant Special, Preliminary, and permanent injunctive relief as requested by Plaintiffs.

2. Enjoin the defendants, their officers, agents, employees, attorneys, laborers and servants and all other persons whomsoever, from interfering with the easement acquired by Koresko with respect to the growth of trees, roots and foliage along the boundary.

3. Enjoin the Defendants, their offices, agents, employees, attorneys, laborers and servants and all other persons whomsoever, from construction of the water line and utilities as contemplated on said Subdivision Plan.

4. Order the Defendants to file a new Subdivision Plan with Tredyffrin Township, such plan subject to public review and

comment, subject to approval only so long as such Subdivision Plan does not impair the property rights of adjoining landowners and otherwise comports with applicable Law and ordinances.

5. Order Defendants to remove the existing propane tanks, driveway, and repair damage to trees and root systems and Plaintiff's realty, which they have already suffered as a result of construction to date.

6. Order Defendants to pay Plaintiffs attorneys fees and costs incurred in connection with preparation and prosecution of this action, consistent with applicable law, and because of the bad faith conduct of the Defendant Farley under 42 Pa. C. S. 2503 and 42 U.S. C. & 1983 and 1985.

7. Order the Subdivision stricken from the record of Chester County.

8. Order the Defendants to pay restitution to Plaintiffs.

Order such other relief as in necessary and appropriate under the Circumstances.

Date: March 5, 2001

BY: _____

Virginia I. Miller, Esquire
John J. Koresko, Esquire
Attorneys for Plaintiff

VERIFICATION

I, JOHN KORESKO V, on behalf of Plaintiffs, verify that the statement made in the Amended complaints are true and correct to the best of our knowledge, information and belief. Plaintiffs understand that false statements herein are made subject to the penalties of 18 Pa. C.S. 4904, relating to unsworn falsification to authorities.

_____ _____

Date JOHN J. KORESKO V

APPENDIX I – DEPOSITION TESTIMONY OF JOSEPH JANASIK WITH EXHIBITS 1 THRU 13

IN THE COURT OF COMMON PLEAS IN AND FOR
THE COUNTY OF CHESTER, PENNSYLVANIA
CIVIL DIVISION

- - -

JOHN J. KORESKO, V., ET AL. ; NO. 01-05343
Plaintiffs :
vs. :
MARY FARLEY, ET AL., :
Defendants :

- - -

DEPOSITION OF JOSEPH JANASIK

- - -

Tuesday, September 10, 2002
Commencing at 1:00 p.m.

- - -

20 N. Church Street
Official Reporters
West Chester, Pennsylvania

- - -

COUNSEL APPEARED AS FOLLOWS:

VIRGINIA I. MILLER, ESQUIRE
for the Plaintiffs

SCOTT E. YAW, ESQUIRE
for the Defendants Mark Farley
and Seaton Ross, L.P.

SUSAN C. MANGOLD, ESQUIRE
for the Defendant Tredyffrin
Township

Reported By:

Paquito Z. Foronda, RMR
Official Court Reporter

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Janasik – 3	Fax/Letter – dated 6/7/00	16
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(It was stipulated and agreed by and among counsel for the respective parties that sealing, filing and certification be waived; and that all objections, except as to the form of the question, be reserved until the time of trial.)

- - -

JOSEPH JANASIK

called as a witness, having been first duly sworn, was examined and testified as follows:

- - -

EXAMINATION

- - -

BY MS. MILLER:

Q: Would you state your name and address for the record.

A. It's Joseph Janasik. Business address, 1100 DuPortail Road, Berwyn, Pennsylvanai.

Q: Have you ever been deposed before?

A: Yes.

Q: When?

A: A year and a half ago, last time.

Q: How many times have you been deposed?

A: I have no idea. Didn't keep track.

Q: Less than one hundred or more than one hundred?

A: Less.

Q: Have any of these depositions been regarding subdivision plans and/or violations of ordinances?

A: Yes.

Q: How many of these?

A: I have no idea.

Q: Can you estimate?

A: It would be a guess, probably a dozen.

Q: When was the last time that you were deposed regarding a subdivision plan or ordinance violation?

A: I don't recall.

Q: You're familiar with the deposition process?

A: Generally, yes.

Q: We'll go over it very briefly for you. I will ask questions. Wait until I quit asking the question and then you may respond. If you do not understand my question, please ask me to repeat it or what you don't understand about it. The court reporter cannot take down any nonverbal responses. No shakes of the head or no nodding. If you could try to be a little louder on the record so he can hear your versus the air-conditioning that we have on right now.

Do you have any questions about the deposition process?

A: I have none, no.

Q: Are you under any medication today?

A: No.

Q: Are you under the influence of alcohol today?

A: No.

Q: Have you been convicted of any crimes within the last ten years?

A: No.

Q: Have you pled guilty to any crime in the last ten years?

A: No.

Q: What is your current occupation?

A: I'm a township manager of Tredyffrin Township.

Q: How long have you held this position?

A: Since 1987.

Q: Previous to being township manager, what was your position?

A: I was the assistant township manager, since 1968.

Q: What is your education level?

A: Bachelor's of Science and Business Administration.

Q: Do you hold any special certificates or certifications?

A: No.

(Janasik Exhibit No. 1 was marked for indentification)

Q: If you would review the document.

A: Okay.

Q: Did you bring with you any materials today?

A: No, I didn't.

Q: Did you see this deposition notice prior to today's deposition?

A: I believe I did but I'm not 100 percent sure.

Q: Did you review the file at the township regarding this case and its subject matter, prior to today?

A: A while ago.

Q: Can you give me an estimation of what "a while ago" is?

A: It was before the summer. Exactly, I don't know.

Q: Okay. What do you understand this litigation to be concerning?

A: I believe that it is a suit from one individual against another and the township is brought in as a third party.

Q: Could you go over briefly the subdivision process that the township uses in a case such as this?

A: You mean how do we process the subdivision?

Q: Yes.

A: Well, an applicant files a form, subdivision application form, which we have available on our website. There are instructions on that application form as to the

number of plans that are required to be submitted, fees that are to be paid, processing fees, and when an application is received, a copy and a application - - separate application form is sent to the Chester County Planning Commission and the matter is scheduled for our planning commission at least once. Depending on the complexity of the subdivision could be more than one that you would have to appeal at the planning commission meeting. By law, they need to have completed their review and forwarded to our Board of Supervisors for final approval within 180 days of - - it's usually the date that it's filed or 90 days after the first planning commission hearing, whichever comes first.

If it's approved, it's recorded here at the county, Recorder of Deeds office. If it's denied, a letter is sent to the applicant advising of the action by the board. It could be the - - the entire application process could be a three-step process, sketch plan, preliminary plan, final plan, again depending on the complexity of the subdivision.

Typically, and I think that this was a two-lot subdivision, that's considered a minor subdivision, so that, very often, it's just one step. I don't recall whether it was one or two steps with this application.

Q: Are you aware that this subdivision was scheduled for just one appearance before the planning commission or more?

A: I'm unaware. I don't know.

Q: Who would know that?

A: You probably could have found it in our records.

Q: It would be in the township's records?

A: Sure. It would be in our planning commission records.

MS. MANGOLD: All of the files were made available to you.

BY MS. MILLER:

Q: In the process, what percentage are normally denied or sent back for modification?

A: I've never done an analysis of that.

Q: Would it be more that 50 percent, less than 50 percent?

A: I have no way of knowing.

Q: Does anyone in the township track this?

A: No.

Q: When is notice given to adjoining landowners and subdivisions?

A: There's no notice required. Certified letters are not sent in any cases. Subdivisions?

Q: Yes.

A: You mean to adjoining property owners?

Q: Yes, or other property owners.

A: No.

Q: If you were aware that, from reviewing the subdivision, that the adjoining landowner would be affected by the subdivision, you would not send out a notice?

A: That's correct.

Q: In your position as township manager, who reports to you? What's your overall duty?

A: Everybody except the police department.

Q: What is your overall duty job description just briefly?

A: I'm the chief administrator officer of the township. I couldn't possibly detail my responsibilities.

Q: Are you involved in the planning commission?

A: You mean as a member?

Q: Any involvement? Do you sit on the board?

A: No.

Q: Do you attend the meetings?

A: Occasionally. Less frequently now that I used to.

Q: What would be occasionally, less than 50 percent, more than 50 percent?

A: Well, it used to be that when I was the assistant township manager, the processing of subdivisions and land development plans through the planning commission was basically my responsibility to administer. I have not done that since 1987.

Presently, the only time that I go is when the person who is now responsible for that is on vacation or we're in between assistant township managers or somethinglike that but that is not normally my responsibility as a township manager.

Q: Who's the assistant township manager?

A: Now?

Q: Yes.

A: Mimi Gleason.

Q: What happens at the township when you receive a complaint about a subdivision.

A: Depends on the complaint.

Q: Describe how you mean?

A: Why don't you describe what you mean?

Q: You receive a complaint regarding subdivision that's already been processed, who in your office handles that?

A: What is the complaint? Describe the complaint, that the applicant crashed his car into a wall or –

Q: When there's a complaint about the subdivision plan itself, that there's a defective subdivision, that after this subdivision has been finalized by your office, if there's a complaint, who would receive it? If it goes directly to the township, who would be in charge of reviewing that and investigating it?

A: You're - -

MS. MANGOLD: Virginia - -

THE WITNESS:

You're confusing me. I don't know what you mean by a complaint about a subdivision.

MS. MILLER: Okay.

MS. MANGOLD: Ask him if he received a complaint in this instance.

MS. MILLER: I'm actually going to go there. I'm trying to get the general policies.

BY MS. MILLER:

Q: If the township receives a complaint about a subdivision plan, that the subdivision plan is not being carried out with that person feels is the township's ordinance, as in zoning ordinances, what does the township do in that case?

A: Do you mean the plan itself or that there was a plan approved and whoever is constructing the subdivision inst' doing it according to the plan?

Be more specific.

Q: We'll go with that.

A: I asked you two situations.

Q: We'll go with the former.

A: The first one?

Q: Yes.

A: This is where the plan is somehow defective?

Q: Yes.

A: If it's a recorded subdivision plan, I mean, it would have been up to the individual to challenge or appeal the decision on the Board of Supervisors, if they felt that it was defective.

Q: In the latter case, where the subdivision is not being completed in accordance with the submitted subdivision plan?

A: Well, either we would send the township engineer out, if the issue were the property lines were stakes, if - - I don't know - - driveway was shown coming out on one road on the subdivision plan, and it may be coming out somewhere else, when it's actually constructed, the probably our building inspector would review that.

Q: In this letter case with a driveway or that type that's not - - where the completed subdivision is not in accordance with the plan, what would the township normally do in those types of cases?

A: Didn't I just answer that?

Q: Well, I'm sorry.

A: If, in fact, it was wrong?

Q: Yes. After you do the investigation, you find out that it is wrong?

A: Then whoever was constructing it would be notified that that was at variance with the approved plan.

Q: In this notice that it was in variance, what action would the township take after that? Would it make the builder correct the subdivision or issue a variance?

A: No. We can't, administratively, can't issue variances. That's a legal process that involves a zoning hearing board. Administratively, we can't change what's on an approved subdivision plan so we would notify the applicant, typically, depending on the severity of the situation, and give them an opportunity to rectify the problem.

(Janasik Exhibit No. 2 was marked for identification)

A: Okay.

Q: Have you had a chance to review the document?

A: I have.

Q: Have you seen this document before?

A: I believe a while ago.

Q: Who is Dennis Torres?

A: A former building inspector.

Q: When the township receives a letter such as this, what action does it normally take?

A: I've been with the township a long time. I don't think that I have received a letter like this. This mentions half a dozen or more things that are perceived to be wrong so it's not really a normal way of handling this.

Q: What did the township do in this case?

A: I don't recall what Dennis Torres did.

Q: Is there anyone with the township that would know what Dennis Torres did after this?

A: Perhaps. I know I don't.

Q: Could you give me a name or two of someone that might?

A: I might have no way of knowing what people know.

Q: Do you know where Dennis Torres ?

A: Works for the City of Philadelphia, as far as I know. Where he's living, I have no idea.

Q: Are your building inspectors required to document when they receive letters such as this?

A: You mean other than keep them in the record?

Q: Yes. Are they required to make reports? Are they required to make any notes to the file other than just take this letter and put it in the file? Would there be follow up on it?

A: Well, I suspect that Dennis probably would not have known exactly what to do with this so he might have asked on of the other inspectors or he could have talked to his immediate supervisor, who was the then assistant township manager. I really don't know what he did.

Q: Who was the then assistant township manager?

A: Terry Woodman.

Q: Is that Ms. or Mr?

A: Ms.

Q: Is she still with the township?

A: No, she's not.

Q: Do you know where she is currently employed?

A: Yes. East Whiteland Township.

Q: Are you aware if there are any notes in the file regarding anything that was done on behalf of this letter?

A: I'm not aware of it.

MS. MILLER: Okay. This would be No. 3.

(Janasik No. 3 was marked for identification.)

THE WITNESS: Okay. I've read the letter.

BY MS. MILLER:

Q: Have you seen this letter before today?

A: No.

Q: When Mr. Lamb receives correspondence regarding the township, it is normally forwarded over to the township?

A: You'll have to ask Mr. Lamb that.

Q: At the top of the correspondence, do you see anything that indicates that this was received by Tredyffrin Township?

A: That's what it says on the top of the - - on top of the letter.

Q: Is that normally when you faxed letters or received letters at the township that would have that type of a fax?

A: I'm sorry. When we sent it?

Q: Or you received it, you know. Is that the type - - the fax notations at the top - -

A: I don't know. I mean, depends on what machine was used. I know we have one now, that it's fairly new. Whether it looks like that or not, I have not idea.

Q: Would this lead you to believe that this was received at the township?

MR. YAW: Objection as to form.

THE WITNESS: Actually not, no. It says from.

BY MS. MILLER:

Q: Okay. I'm going to require to have all of the township records stamped. If you will send back over stuff because he has no idea what these records are, if they were from the township. I only took things that were out of your files. Obviously, he's not reviewed it. I am having a hard time finding anyone from the township who's familiar with these records.

I want something from the township saying that you have the file, these did come from our file, they were received because he's obviously - -

MS. MANGOLD: Virginia - -

MR. YAW: You said that you got them from the file.

MS. MANGOLD: You reviewed the file yourself.

MS. MILLER: There's now a question - - you're saying there's a question on authenticity. That's what I'm getting at right now, whether these - -

MS. MANGOLD: If the file was presented to you at the township building and you reviewed it and you had documents taken out of there to have copied, I'm not quite sure what the problem is.

MS. MILLER: Because I want the township – because I don't have to go through the authenticity, I will put in a request in writing to you tomorrow.

MS. MANGOLD: You want me to have the entire township file copied and bate stamped?

MS. MILLER: Yes. I think that there were certain things that Mr. Yaw sent me that you did not send me afterwards. I went to make sure I have everything.

MS. MANGOLD: Correct me if I'm wrong, you guys determined what I wanted copied.

MS. MILLER: I'm saying things that have happened since. We haven't reviewed that file since - -

MR. YAW: March of 2002.

MS. MANIGOLD: I did not take any responsibility for determining what copies were made. You selected the copies that you wanted. Mr. Yaw selected the copies he wanted. If something was not turned over, don't look at me.

MS. MILLER: I'll put it in writing.

MR. MANGOLD: I understand Mr. Yaw sent around what you took - -

MR. MILLER: I'm saying, there are documents now that have been mentioned. I didn't see in that - -

MS. MANGOLD: Such as?

MS. MILLER: The notice of who was at that hearing. I did not see anything - -

MS. MANGOLD: Notice of who was at what hearing?

MS. MILLER: The planning commission hearing that discussed this subdivision. I was told that there was a hearing. I won't take any more of your time. I'll put it in writing so you know exactly what I'm looking for. If there was a publication and if there was a hearing and people attended, there should be some record of it.

MS. MANGOLD: I think the testimony was that you would be able to look at the file and know if there were one or two hearings. I don't think that - -

MS. MILLER: I don't remember seeing anything in that file when I looked through it, to indicate that. So that's where I'm going. Maybe at that time someone went through it and did not necessarily - - I'm not saying it was anything that maybe someone didn't give us anything. I don't remember seeing it there and that was one of the things that I was looking for.

MS. MANGOLD: You were presented with the entire file. Can you give me your formal request?

MR. YAW: Let me also clarify. The documents were produced in response to my request for production.

MS. MILLER: Yes.

MR. YAW: I don't remember if there were minutes of meetings of the planning commission or the Board of Supervisors or if there was proof of advertisement for the plan. I just don't remember. I kind of recollect that there was but I don't recall exactly.

MS. MANGOLD: Let me just say this, there was no document request directed to the township at that time, but what I did, at Mr. Yaw's request, because he did have a document request out, I presented the entire file. I asked the township to give me the entire file, 1175, 1185, and Mr. Koresko's property. Laid out on the table at the township offices for your review and Mr. Yaw's review or anybody else that wanted to take a look at it involving this case so if you did not come across something, I can assure you, it wasn't there.

MS. MILLER: There is a discovery request, a document request, on you now.

MS. MANGOLD: I understand that. As I advised you, nothing has been put in that file other than what I have presented to you recently on the propane tanks that is different than what you saw in January, I believe.

MS. MILLER: If you will either copy the file or I will come back over and review it again, because I do not think that there were certain things that have been mentioned at these meetings that I remember seeing and Mr. Yaw provided something to me that you had not provided to me after the fact, I would like to make sure that the whole file is copied.

MS. MANGOLD: I would like you to go to the township and look through it. I do not want to have any accusations out that I have not been presented everything. The best thing for everybody is for you to go to the township.

You will have access to the complete files and you can go through them.

MS. MILLER: Okay.

MS. MANGOLD: Again.

BY MS. MILLER:

Q: So you're not familiar with this letter?

A: No.

Q: Were you familiar - - are you familiar with the fact that Mr. Koresko wrote this letter appealing the issuance of the building permit?

MR. YAW: Objection as to form.

BY MS. MILLER:

Q: Are you aware - -

A: I have no idea when he wrote the letter.

Q: Are you aware if Mr. Koresko ever appealed the issuance of a building permit regarding these properties?

A: To me?

Q: To anyone at the township, within your control?

A: I'm aware that he did not file anything with me and I'm the zoning officer so whether he saw the janitor in the hallway, I have absolutely no way of knowing.

Q: Who is the solicitor for Tredyffrin Township, who is that currently?

A: William Lamb.

Q: What is the duty of the solicitor for Tredyffrin Township?

A: His duties are general duties. Represents most of the boards and commissions, certainly the Board of Supervisors to whom he reports.

Q: Does someone from Mr. Lamb's firm normally attend the planning commission hearings?

A: No.

Q: As the township manager, if Mr. Lamb receives such a letter as this, what would you expect him to do with this letter?

A: I don't know. Depending on the circumstances, I would suspect that he would ask me about it, if there was something that he was unfamiliar with. In this case, since I wasn't doing the subdivision applications, he might have contacted Terry Woodman who was. I don't know what he did in those circumstances.

Q: You're not aware that he did anything? You're not aware of any actions that Mr. Lamb took regarding this letter?

A: I'm not aware of it, no. That doesn't mean that he didn't do anything. By the way, Mr. Lamb is not the solicitor for the zoning hearing board. The zoning hearing board has their own solicitor.

Q: Who would that individual be?

A: I think, at that time, it was - - the individual is Kevin Holleran.

Q: Are you familiar with a Salvatore Bello?

A: No.

(Janasik Exhibit No. 4 was marked for identification)

Q: Have you seen this letter before?

A: I don't recall, no.

Q: Are you familiar with Vincent Pompo?

A: I am, yes.

Q: Who is Vincent Pompo.

A: An associate of Mr. Lamb's.

Q: Does Mr. Pompo work on any Tredyffrin Township matters?

A: He does, yes.

Q: What areas does Mr. Pompo work on?

A: Many of the areas that Mr. Lamb does, general municipal law.

Q: Are you aware if this letter was ever forwarded to Tredyffrin Township?

A: I have no way of knowing.

Q: Is there anyone at the township that would know?

A: Could have been one of the inspectors. It could have been the assistant township manager at that time. I don't know. I just know that I don't recall seeing it.

Q: When did you become aware that there was litigation concerning Mr. Koresko and Mrs. Koresko and the 1175 and 1185 Seaton Ross Road properties?

A: It was probably over a year ago. Exactly when, I'm not sure.

Q: Do you remember who originally discussed it with you?

A: I believe it was Mr. Lamb.

Q: Factually, what did Mr. Lamb tell you about this?

MR. YAW: Objection.

MS. MANGOLD: That's attorney/client privilege.

MS. MILLER: I'm just asking if what he told him factually. I'm not asking about any legal opinions, not on anything else.

MS. MANGOLD: Still attorney/client privilege. It doesn't matter if it's factual or legal in nature. This is discussion between client and attorney.

MS. MILLER: I think that in this case, when the actor is within - - we'll hear this one again. I'll bring in the case next time. I will. I think, actually, in this case, because they were involved in the act, all I want to know - -

MS. MANGOLD: Who was involved in what act?

MS. MILLER: The review of the subdivision and the entirety of the investigation by the township.

MS. MANGOLD: You can bring the case law in but I will stand on the attorney/client privilege.

MS. MILLER: Okay.

BY MS. MILLER:

Q: Who handled the investigation of the 1175 and 1185 claims at the township?

A: On what issue are we talking now?

Q: The litigation, this complaint that we have in this matter regarding - -

A: Litigation?

Q: Who handled the investigation, when you initially received all of these letters? Who handled any investigation regarding Mr. Koresko's claims?

A: I imagine - - I know it wasn't me. It could have been Vince Pompo. It could have been Mr. Lamb and one of the assistant township managers, whoever that was at the time. Depending on when it was, it could have been the building inspectors, could have been a combination of those but I personally did not and that's all I'm certain of.

Q: So you're not aware of anyone investigating Mr. Koresko's claims?

A: I'm not aware that they did or didn't.

Q: Is there anyone at the township who would be aware of anyone or who handled Mr. Koresko's claims?

A: I have no way of knowing that.

Q: If a letter such as this were forwarded - -

A: Which one are you referring to?

Q: The letter that you have in front of you now.

A: Okay.

Q: What department would you think that would be forwarded to? Who would Mr. Pompo forward that to at the township?

Mr. Pompo, you're telling me, it's the attorney for the township, one of the attorneys?

A: That's correct.

Q: That represents the township?

A: Right.

Q: When he receives this type of correspondence regarding the township, whom does he forward it to?

A: I don't know if Mr. Pompo has a routine. It could be me, it could be one of the assistant managers, or not one of - - the assistant township manager. It could be the township engineer. It depends on the circumstances. I don't know who Vince Pompo had discussed this issue with, if he had at all, with any of the township employees so I don't know.

Q: So you have no knowledge of whether Mr. Pompo discussed this with anyone?

A: Well, I don't know whether he did or did not.

Q: You've reviewed the file at the township regarding 1175 and 1185?

A: Right.

Q: 1175 and 1185 properties?

A: Okay.

Q: Do you remember seeing anything in the file that showed Mr. Pompo directed this to anyone?

A: It was a while ago that I looked at that, as I indicated before. Specific correspondence or specific permits or anything like that, I don't recall what was in the file.

Q: Do you remember seeing the name of anyone at the township that investigated Mr. Koresko's claims?

A: I don't recall, no.

Q: Regarding subdivisions, do you normally receive letters from the Chester County Planning Commission?

A: Yes.

Q: When you receive a letter from the Chester County Planning Commission, who reviews it?

A: I usually pass it on to the assistant township manager. I receive the letter because I'm the secretary to the township and by law, that's who we have to send the correspondence to.

(Janasik Exhibit No. 5 was marked for indentification)

THE WITNESS: This is a three-page letter. Is there a particular section that you want me to look up?

BY MS. MILLER:

Q: I want you to review the whole letter, please.

A: Okay.

Q: Have you seen this letter before?

A: I may have. It was addressed to me. I don't recall the contents of it, though. I suspect that I may have read it.

Q: Does the County of Chester Planning Commission review every subdivision in Tredyffrin Township?

A: Yes.

Q: How often do they draft letters commenting on the subdivision?

A: Every time.

Q: What - -

A: Most of it is boilerplate, actually.

Q: What does the township then do with their recommendations?

A: Again, it's a very general question. I don't know that there's a typical answer. It would depend on what the recommendation is.

Q: What did the township do with this letter?

A: I don't know. This would be something that I would typically forward to the assistant township manager.

It notes some, for instance, defects in the signature block. Hardly earth shattering but we probably would have the engineer who prepared the plan correct it.

Q: On Page2, there is a title, "Access and Circulations" ?

A: Uh-huh.

Q: With regard to Number 4, if the township received this comment, what would they normally do?

A: I think that we would make our own determination as to whether we thought it was a good idea or not.

Q: Do you know in this case if anyone did?

A: No.

Q: Do you know - - you do not know if anyone evaluated that?

A: I think that's what I said, yes.

Q: Going down, there's no Natural Features Protection. When there's something like this on the letter, from the County of Chester Planning Commission, is anything done? Who is it directed to?

A: Which one are you referring to?

Q: The Natural Features Protection, No. 5, 6 and 7 - -

A: All three?

Q: Yes. For each one?

A: Well, No. 7, for instance, is "The township engineer should verify that the design and capacity of the proposed storm water facilities conforms to ordinance provisions.:" Fairly obvious. It's something that we typically do.

Q: What about No. 6?

A: We do not need to have it redone because it's a suggestion of the planning commission.

Q: Are you saying that all of these are just suggestions, that nothing in this recommendations has to be followed.?

A: These are suggestions that are - - nothing in here that I've read so far that indicates any noncompliance with a provision of our ordinance. If it did, then we would obviously try to rectify that violation but when there are suggestions made, they're taken as suggestions.

Q: On No. 6, it refers to the area being wooded and if you read the sentence, with any grading of the area within the drip line. Are these suggestions then that are forwarded to the builder or what - -

A: The builder gets a copy of these, yes. Again, there's nothing in No. 6 which indicates any violation of any ordinance. It would then be up to the planning commission, township planning commission, the applicant, to decide whether that suggestion should be accepted.

Q: If, on the final subdivision plan, it would note, Revise as per Chester County Planning Commission, letter of February 16, 2000, would that encompass that whole letter into the final subdivision plan?

A: I don't know.

Q: Who at the township would know?

A: Whoever - - it may not be anybody at the township. Who put that on the plan? I'll ask you.

Q: That's what I'm asking you. Who normally would put that on that on the plan? Let's add that as - - if we could mark this one as Janasik No. 6.

(Janasik Exhibit No. 6 was marked for indentification.)

A: I guess it would be somebody from RKW Engineering Services.

Q: Would comments from the township normally cause a clause such as that to be added to the final subdivision plan?

A: No, not necessarily. In fact, typically, the comments of our Tredyffrin Township Planning Commission, on the subdivision application, would be made as conditions of approval, would be their own condition. It would not be something that was a suggestion of the Chester County Planning Commission. In other words, if it were, you know - - we think that the lot should be 20 percent - - if

the planning commission - - Chester County Planning Commission said, we think the lot should be 20 percent greater in area, the planning commission would not say - - the Tredyffrin Planning Commission would not say, change it per the recommendation of the County Planning Commission.

They would say, as a condition of approval, our approval, meaning the township planning commission, increase the area by 20 percent, so as I read that, having read a thousand subdivision plans, that is something that the applicant put on, by his own volition, not something that he was instructed to do by the township.

MR. YAW: Or her own volition?

THE WITNESS: Yes.

BY MS. MILLER:

Q: You are familiar with subdivision plans?

A: I am.

Q: Have you reviewed this subdivision plan prior to today?

A: Not thoroughly.

Q: I will give you a moment to just look it over.

A: Okay. Anything in particular that you want me to look at? There's a lot of information on here.

Q: Just a general - - I'll point to you different areas.

A: Okay. Why don't you start.

Q: I notice certain trees are marked down here.

A: Okay.

Q: Are you familiar with what trees have to be marked on a subdivision plan?

A: Generally trees over certain diameter.

Q: Does anyone from the township review this plan to make sure that it conforms with the trees that are supposed to be placed on it?

A: You mean someone goes out to look to see if the 26-inch oak tree, where one might be indicated?

Typically, not.

Q: Going back to the County of Chester Planning Commission - -

A: To the letter?

Q: Yes, to the letter.

A: Uh-huh.

Q: If you look at, I believe it's No. 6 - - regarding that they reviewed an aerial photograph?

A: Uh-huh.

Q: Does anyone at Tredyffrin Township do that?

A: Review aerial photographs?

Q: Yes.

A: Don't review them because - - in a case like this, this has more information on it than an aerial photograph does.

Q: Is there anyone at Tredyffrin Township or connected with Tredyffrin Township that is concerned with tree conservation? Is there a tree commission?

A: We have no tree commission.

Q: Is there anyone at Tredyffrin Township that reviews a subdivision plan for natural features protection?

A: Typically, yes. That's part of the subdivision review process.

Q: Who's the person that normally does that?

A: Township engineer, consulting engineer. We use consulting engineers to review planning. The planning commission does.

Q: Are you aware of who did it in this case, reviewed this plan, or if it was reviewed?

A: It might have been all of those.

Q: Do you normally sign all the final subdivision plans?

A: Yes. I usually do. The only exception would be if I'm on vacation or something like that, then the assistant township manager would sign it.

Q: Do you review them before you sign them or do you just sign them?

A: I sign them, to attest that the supervisors have approved them, not as part of a formal review process.

Q: But do you normally look at them or do you just - -

A: Sometimes.

(Janasik Exhibit No. 7 was marked for indentification.)

MS. MILLER: This is similar except for - - I couldn't copy the entire side, just the comments from the side.

(Recess taken at 2:15 p.m.)

BY MS. MILLER:

Q: Back on record. Referring back to Janasik 2, who is Mr. Hawkins that's mentioned in Janasik No. 2?

A: He's one of our building inspectors.

Q: Is he still with the township?

A: Yes.

Q: How long has Mr. Hawkins worked for the township?

A: Probably five or six years.

Q: Did you ever discuss this matter with Mr. Hawkins?

A: No.

Q: On the larger subdivision plan, is there anything on that that would indicated who was in charge of reviewing this subdivision plan for the township?

A: No.

Q: Do you know, at the time, who was normally doing that process?

A: I'm not sure what you mean by - - in charge of reviewing it? The review process involves a lot of people looking at it, township engineer, the assistant township manager, the planning commission, consultants that we use to review plans. I don't know what you mean by that.

Q: Looking at the time, dated and anything else on this document, can you tell me anyone that you would think that would have reviewed this?

MS. MANGOLD: If you want a name, I think that he told you all the people, the positions

MS. MILLER: I want names of individuals.

THE WITNESS: Who would have reviewed them?

MS. MILLER: Yes.

THE WITNESS: Typically or who did in this case? I don't know who all would have in this case or

who all did in this case. Typically, the assistant township manager would.

BY MS. MILLER:

Q: Which at that time was - -

A: At the time of the subdivisions would be Terry Woodman, township engineer, William Bryant, or his assistant. We used consultants, the firm name is Arro, A-R-R-O, Engineering Consultants, the entire planning commission, our planning commission, the Chester County Planning Commission.

Q: Who was on your planning commission at that time?

A: I don't recall the names.

Q: Can you recall anyone?

A: There were nine people. Who the exact combination was, I don't know.

Q: Okay. Going back to Janasik No. 4, if you will review the document again.

A: Okay.

Q: And I will tell you that this was the enclosure to that document to Vince Pompo.

A: If you say so.

MS. MANGOLD: The large one? The large - -

MS. MILLER: This one, which is Janasik No. 7.

THE WITNESS: Your question?

BY MS. MILLER:

Q: I wanted you to review it. Did you actually want to review the document and then the letter - -

A: No.

MR. YAW: Wait. I'm sorry to interrupt. Just so I understand because this is something different that what was on the record this morning. This document, the writing on here, like the dark - - where it says "gas tank" and "front house, new location," and "tank," that's all John Koresko's writing?

MS. MILLER: Uh-huh.

MR. YAW: This morning, I thought it was Mark Farley's.

MS. MILLER: At Mark Farley's deposition, he agreed to where certain of those items were marked.

MR. YAW: This is John Koresko's writing?

MR. MILLER: Yes.

MR. YAW: John is the one - - Mr. Koresko is the one that drew the circle and put tank and then drew the house?

MS. MILLER: Yes. This was given to the Tredyffrin Township so I mean - -

MR. YAW: I don't know that. I just want to clarify that one point.

MS. MILLER: Yes. If you want to review part of his deposition, he agreed to the general locations.

BY MS. MILLER:

Q: You've had a chance to review it and you've never seen this document before?

A: Not - -

MS. MANGOLD: Which document?

BY MS. MILLER:

Q: These should be considered - - have you seen either document?

A: Not that I recall.

Q: Did anyone ever mention that either of these documents existed or brought them to your attention?

A: No, not that I recall.

Q: Were you aware that, at least as early as July 2001, that the township was on notice of problems with propane tanks?

MR. YAW: Objection as to form.

BY MS. MILLER:

Q: When were you aware that there were problems with propane tanks on this property?

A: Gees, it was a conversation that I had with Mike Pilotti and when that was, I don't know. It was some time after I was aware of the lawsuit so it would have been within the last year or year and a half.

Q: Okay. So prior to your conversation with Mr. Pilotti, you were unaware that there were problems with propane tanks on this property?

A: That's correct.

Q: What does the township normally do in a case where someone notifies the township that trees that where someone notifies the township that trees that were to be maintained on a subdivision plan were instead removed?

A: When you say "were to be maintained," you mean as a condition of approval of the planning commission?

Is that what you mean?

Q: Well, I'm not aware that that ever actually happened so I'm speculating as to what might happen, if it were to happen for the first time. Typically, we would advise the applicant to cease and desist. Obviously, we can't - - once a 25-inch tree is taken down, its down. There's no way to put it back up and he would - - whoever the applicant

is - - would have to either appeal our decision or stop doing it.

In that situation, I'm not sure how you would rectify it. We might have to institute some sort of ordinance violation notice, subdivision land development plan or ordinance violation but that would be only where preservation of those trees was a specific condition of approval.

Q: In this case, there are trees listed on the subdivision plan?

A: Uh-huh.

Q: And there are trees that are marked on bigger subdivision plan, the final subdivision plan?

A: Uh-huh.

Q: There are trees that are marked with Xs, showing that they are to be removed?

A: Okay.

Q: After the subdivision is finalized, is the builder to subdivide according to this or are they - - my question is, if trees are shown to be left on this, should those trees be left?

A: Should they be left or are they required by law to be left?

Q: Are they required by law to be left?

A: No.

Q: Is there any requirement for tree conservation in Tredyffrin Township?

A: There is no ordinance requirement. The only requirement for keeping the trees is, as I sort of alluded to when I stared answering these questions, was if there was a specific condition of approval - - for example, I note on the plan, there's - - on one of the lots, lot one, there's a 30-inch oak tree. If , as a condition of approval of the planning commission, they required preservation of that tree, that would be a matter that we could prosecute as violation of the subdivision ordinance. The existence of trees on a plan doesn't require that they be preserved and there's no ordinance that requires their preservation

Q: Is there a portion of the ordinance that states that every subdivision or land development plan should be designed to preserve and protect the natural features, including wooded areas?

A: If you say so. I mean, I haven't memorized the ordinance but I can - - that would be nice to have a provision like that.

Q: Are you familiar wit the Tredyffrin Township code?

A: Yes. I don't know it by heart. I will admit to that.

Q: Who do you rely on at the township to make sure that the subdivision ordinance regarding natural features and wooded areas is followed?

MS. MANGOLD: I will object. I don't think that was his testimony.

BY MS. MILLER:

Q: You're saying that you're not aware of the part of the ordinance that I just read, the Tredyffrin ordinance, 181-43? I took out a couple words on it.

A: You see, I didn't know that you took out a couple words. So obviously, that indicates that I haven't memorized that ordinance.

Q: Who at the township makes sure that 118-43 is enforced in subdivision plan?

A: What's the enforcement that's required under that?

MS. MANGOLD: Do you have a copy of what you're reading?

MS. MILLER: No. Actually, I don't. Mine is marked up. I'm just seeing if there's anyone at the township that is concerned with the preservation of the natural features of the land and enforcement of any ordinances regarding these natural features.

MS. MANGOLD: That's assuming that there is a mandatory provision in there.

BY MS. MILLER:

Q: Is there anyone - -

A: What's the requirement that we're talking about? I might be able to answer your question better.

Q: Is there anyone at the township that reviews subdivision or land development plans to make sure that they're designed to preserve and protect the natural features of the land?

MS. MANGOLD: I will direct him not to answer unless he's looking at a copy of the code. I'm not real comfortable with the question. Mr. Janasik said that he has not reviewed the code, does not know the code by heart. I don't want him to answer a question that - - you know, I'm sure that when he's faced with that, he has a copy of the code readily available, that he can address it.

BY MS. MILLER:

Q: To your knowledge, is there anyone that reviews this for natural features of the land? I'll make it that broad.

A: To a varying extent, I'm sure everyone that reviews the ordinance. I think that was a previous question that I answered.

MR. YAW: Reviews the ordinance or - -

THE WITNESS: Reviews the applications for subdivision.

BY MS. MILLER:

Q: Are you aware of any Tredyffrin Township ordinances that direct a builder on the way - - if they need to remove trees or any protection of the trees?

A: I'm sorry. Can you repeat that?

Q: Are you aware of any Tredyffrin Township code that involves removal of trees, if the builder has to remove a tree, what he should do?

A: No.

Q: Are you aware of any Tredyffrin Township code that states any duty of a builder to protect roots of a tree?

A: No.

Q: Are you aware of any township code that addresses any development within the drip line of the trees?

A: No. When you say addresses, I'm sure that you meant regulates.

Q: Or even mentions?

A: I don't know.

Q: I mean, to any event.

MS. MANGOLD: I want to clarify your answer. You were answering no to those because you assumed that she meant regulated, not mentioned?

THE WITNESS: Yes.

MS. MILLER: We can use the word "regulated."

MR. YAW: All these questions are asking Mr. Janasik legal conclusions about requirements on township code, which is the issue that we addressed this morning.

MS. MILLER: I'm actually done with that.

BY MS. MILLER:

Q: Back to Janasik No. 7, reviewing that and with Mr. Koresko's comments, is there anythink about that document that would disturb you as the township manager of Tredyffrin?

A: That would disturb me?

Q: Anything that you would say, if I received this document, I should have this investigated?

A: I'm looking at this.

Q: In conjunction with the letter, actually spells out what all these different claims of Mr. Koresko - -

A: Well, first of all, relative to the Xs, I think that's, from reading a letter, and indication of trees that were removed from the site. I would not find that necessarily disturbing, because as I said, there's no requirement that trees be preserved, specific trees, unless that was specific condition of approval and I'm not sure that it was in this case.

As far as the location, the circles that have tanks, there's very little to be gathered from that notation other than the general location. It's certainly not, I would guess, not intended to be drawn to scale, which even, with the size of this map, it would be difficult to try to scale off to see whether there were any specific zoning ordinance violations.

Q: If you would refer to Mr. Koresko's letter, where he says 5th?

A: Sorry.

Q: Refer to Mr. Koresko's letter, where he says 5th, Farley has done construction within the 25 - -

A: I see.

Q: 25-feet side yard setback?

A: Okay. What is the 25-yard side yard setback?

Q: I can't speak for what Mr. Koresko is necessarily saying in that letter.

A: The minimum requirement in that district is 15 feet so I'm not sure what he meant by that.

Q: If you found out that those tanks were within the 15 yards, would that concern you?

A: 15 feet?

Q: Yes.

A: 15 feet is a lot different than 25 yards.

25 yards - -

Q: His is 25 feet.

A: Sorry. 25 feet - - well, I mean, if a tank were located within 25 feet of the side yard in that zoning district, it would be fine so it's like - - what does that mean? It's okay.

Q: Would you have a problem if I told you that that was within 15 feet?

A: If you told me?

Q: If you did - - if you saw that, you would say, -- would you investigate to see - - he's saying it's within - -

A: It doesn't matter, because he's allowed to do it within 25 feet.

Q: But if you found out it was actually 15 feet and it was within that 15 feet - -\

A: How would I be able to know that, from that letter?

Q: So if he said it's within 25 feet, you're going to take it that he's wrong. It has to be 25?

A: He could be absolutely right. There is nothing illegal about being with 25 feed.

Q: So you would have someone from your township investigate that?

A: No. It's like - - say, I would have - - if I would investigate, if someone wrote to the township and said, someone is complying with the speed limit on the street, what's to investigate?

MS. MILLER: I don't have copies of this. This is Pilotti No. 5.

BY MS. MILLER:

Q: If that was given to someone at the township, would that concern you?

A: Yeah, it would?

Q: Have you ever seen that document before?

A: No, never.

Q: Did Mr. Pompo ever discuss receiving that document?

A: You would have to ask him?

Q: With you, did he discuss receiving that document with you?

A: No.

Q: Were you aware in December of 2001, Mark Farley, the defendant in this matter, was deposed?

A: No.

Q: Did anyone from Mr. Lamb's firm call you regarding that deposition?

A: No, that I could recall.

Q: Okay.

A: I don't recall.

Q: No one from that deposition called you to notify you that there were problems with these tanks, given as testified to by Mark Farley?

MR. YAW: Objection as to form.

THE WITNESS: I thought that I just answered that but if it's different, please explain how.

BY MS. MILLER:

Q: Prior to Mr. Pilotti's discussion, you were unaware, and to the best of your knowledge, everyone at the township was unaware of any problems with these - -

A: I can speak for myself. I was not aware.

Q: Is there anyone that you would know at the township that would be aware of this?

A: How could I possibly answer that question?

Q: Who would - - if Mr. Pompo received this type of information, whom would he normally go to discuss this information?

A: I think that I answered that before.

Q: I'm actually saying, with these propane tanks, no one - - to the best of your knowledge, can you give me a name at that time, December of 2001?

Mr. Pompo gets notified that there's a possible illegal tank that was put in without permit. Whom would you expect him to call, as your agent of the township, as your solicitor?

MR. YAW: Objection as to form. Compound question.

BY MS. MILLER:

Q: Whom would you expect Mr. Pompo to notify of any problem in December of 2001 with propane tanks?

A: It could have been the township engineer. It could have been one of the inspectors, the code enforcement officer, the assistant township manager. It could have been any of those.

Q: If this person reviewed this matter, would there normally be something in the file out at the township?

MS. MANGOLD: What do you mean by "something"?

BY MS. MILLER:

Q: Would there be notes? Would there be a letter? Would their be anything in the township record to indicate that this matter was reviewed?

A: Describe the circumstance. Somebody in the township whose name we don't know, how do the find out about this?

Q: December 2001, there was a deposition. Your attorney from Mr. Lamb's firm was present. These tanks were discussed and it's a matter of record, if you want me to pull out the Farley deposition. If there was a suspected problem with these tanks and they notified someone at the township of this, if Mr. Lamb, someone from Mr. Lamb's firm - -

MS. MANGOLD: He's already answered this question. He's said it could be either the township engineer, the assistant manager.

BY MS. MILLER:

Q: I'm asking him if I should - - if this was investigated, would there be something in the file?

A: It depends on - - if it's received by a letter from Mr. Lamb's office saying, you know, there's a problem that was brought up at the deposition, will you investigate this, then obviously we would have a written record. If there were a telephone call and say, here was the testimony, can you go out and verify that, there may or may not be a written record.

Q: In cases such as this, if you received just a telephone call, there would be nothing necessarily in the record?

A: Not necessarily, right.

Q: When you receive written correspondence from individuals such as Mr. Koresko, is there normally something - - some reply made to Mr. Koresko from someone at your - - someone from the township?

A: I would think, if it required a reply, if it were sent to me, I am fairly confident that I would reply.

Q: Does Mr. Koresko, as an adjoining neighbor, have an ability to complain to the township about suspected violations of zoning and/or building code violations?

A: Sure.

(Janasik Exhibit No. 8 was marked for identification)

Q: Have you seen this letter before?

A: I don't recall but - - may have actually gone directly to the file. I mean, there's no indication of me receiving a copy of it.

Q: Do you believe that Mr. and Mrs. Koresko have any right to complaint about the propane tanks on the neighboring property?

MS. MANGOLD: Let me clarify that question.

Are you asking if they have the right to or if there's any merits to it?

MS. MILLER: Any rights to.

MR. YAW: Like legal rights?

MS. MILLER: Just if they have any rights to complain to the township, the right to come to you and say - -

MR. YAW: Like the constitutional rights, pursuit of happiness, that kind of thing, or are you talking- - that's a very broad question.

MS. MANGOLD: It is a broad question. You can answer it.

BY MS. MILLER:

Q: If you think they have any rights?

A: Well, I won't answer as to whether they have any legal rights. All I know - -

Q: That's why - -

A: We receive complaints every day and we receive them. Whether or not, in our own minds, we think that they're warranted frivolous or not, I mean we have to accept complaints.

Q: Are you aware that Mr. Pilotti was the first one to investigate these tanks, that we have record of?

A: That could be. I couldn't tell you who the first one was.

Q: Are you aware of anyone prior that might have investigated these tanks?

A: I'm not aware of any.

MR. YAW: I'm going to object as to the form. You're mischaracterizing Mr. Pioltti's testimony from this morning.

BY MS. MILLER:

Q: I'll go through Mr. Pilotti's whole record for you in this file. I'm going to go through the whole thing. That's probably the best.

MS. MANGOLD: I don't believe that.

BY MS. MILLER:

Q: If you thing they have any rights?

A: Well, I won't answer as to whether they have any legal rights. All I know - -

Q: That's why - -

A: We receive complaints every day and we receive them. Whether or not, in our own minds, we think that they're warranted frivolous or not, I mane we have to accept complaints.

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A: I'm not aware of any.

MR. YAW: I'm going to object as to the form. You're mischaracterizing Mr. Pilotti's testimony from this morning.

BY MS. MILLER:

Q: I'll go through Mr. Pilotti's whole record for you in this file. I'm going to go through the whole thing. That's probably the best.

MS. MANGOLD: I don't believe that Mr. Pilotti ever testified that he was the first person to address the propane tanks.

MR. YAW: That's not the part that I was getting at. He didn't say investigate. He said that he was presented with an application and he reviewed it.

MS. MILLER: There's nothing on the record right now to indicate that anyone else has investigated.

MS. MANGOLD: There's nothing else on the record that says somebody hasn't investigated. Mr. Janasik testified that he does not know. It was not him.

MS. MILLER: There's nothing in the township record to indicate that anyone investigated these - -

BY MS. MILLER:

Q: Let me say, is there anything, to the best of your knowledge, in the township record to indicate that any

one other than Mr. Pilotti investigated any permits or any illegality or anything to do at all with these propane tanks?

A: I know that Mr. Pilotti did. My answering my other way than that would be speculative.

(Janasik No. 9 was marked for identification.)

Q: Have you ever had a chance to review it?

A: Yes.

Q: What is No. 9

A: It appears to be a letter from Emmy Baldassarre, one of our inspectors and code enforcement officers, to Mark Fraley, indicating what needs to be done before a certificate of occupancy can be issued.

Q: Does Miss Baldassarre normally put problems such as this in writing, after her review?

A: More often that not, yeah.

MS. MILLER: This is an exhibit from Mr. Farley's depositon.

(Janasik Exhibit No. 10 was marked for identification.)

BY MS. MILLER:

Q: Have you had a chance to review No. 10?

A: Yeah. I've skimmed over it.

Q: What is No. 10?

A: It's a letter from Dennis Torres to, I guess it was sent to either Mark Farley or Ollie Bower. I'm not sure.

Q: What does that list include? What type of items are on that list?

A: These are usually items that would relate to an application for a building permit.

Q: Does that indicate that he made a review of the property and made these findings?

A: Yes. It says, preliminary review.

Q: Does Mr. Torres normally do these types of reviews and follow up with a writing?

A: Well, he doesn't anymore, because he doesn't work for us but I think that while he was here, he tried to do that.

Q: Okay

(Janasik Exhibit No. 11 was marked for identification.)

A: Okay.

Q: Have you ever seen No. 11 before?

A: No.

Q: What is No. 11?

A: It's a letter sent to your client form Emmy Baldassarre, enforcement officer, noting some problems with the property at 1159 Seaton Ross Road.

Q: When there are complaints received by neighbors in this case, is there normally a letter done to the violating neighbors?

A: It depends on the circumstances. If it's something that's fairly easy to rectify, maybe just a phone call, sometimes. Actually, the inspector will knock on the door but it depends on the circumstances.

(Janasik Exhibit No. 12 was marked for identification.)

A: Okay.

Q: Have you reviewed this document before today?

A: I don't recall. I think that Mike indicated to me that he was going to send it. I don't recall that I actually saw the document.

Q: If you're usually CC'd at the bottom of this document like this, do you normally receive it to your office?

A: Sometimes in the file but that really depends on the individual writing the letter, whether they provide me with a copy.

Q: Do you remember discussing this with Mr. Pilotti?

A: I think that I indicated that I did.

Q: Do you remember discussing this letter?

A: I don't remember discussing the matter of whether a letter would be sent. We certainly didn't discuss it word-for-word.

Q: Why wouldn't a letter be sent in a case like this?

A: As I indicated before, typically, with a violation, depending on the severity of the violation, there are ways that we deal with it that don't necessarily involve a written notification, telephone call, knock on the door, depends on the severity of the situation.

Q: In this letter, Mr. Pilotti mentions fines that could be issued.

How often does the township issue fines against builders, in cases such as this?

A: Well, we don't actually issue the fines. We have to issue - - we have to take them to the magistrate.

Q: How often do you recommend that fines be issued?

A: It's only after the cease and desist order has been ignored or if there's a remedy suggested, that the remedy hasn't been taken. We allow individuals an opportunity to correct a violation, before we actually prosecute. By the way, that's what the codes require us to do.

Q: Do the codes require you to investigate matters such as Mr. Koresko's letters regarding potential violations of ordinances?

A: No.

Q: How often do builders violate and get letters such as this?

MS. MANGOLD: Well, Mr. Janasik has been with the township a long time. You mean monthly?

BY MS. MILLER:

Q: Can you give me a percentage, how often?

A: Let me tell you, first of all, I don't see 99 percent of the correspondence that goes out of the township building. I'm not sure - - I think that you - - I think that you would have to ask one of the inspectors that question to really get a reliable answer.

Q: In the past, when builders have violated subdivision plans - -

A: By - -

Q: By failing to conform with the subdivision plan. I'm just going to ask you if you've done some of these actions?

A: Okay. That is really not a whole lot more specific that your first question.

Q: Have you ever revoked a subdivision plan?

A: I don't know of a process to do that.

Q: If a builder misrepresents, makes material misrepresentations on a subdivision plan - - are you aware of

any instances in the township where a builder has made material misrepresentations on the subdivision plan?

A: No.

Q: Are you aware of any actions that were taken on Mr. Koresko's letters, specifically Janasik 2 and Janasik 4?

A: By - -

Q: Anyone at the township? Are you aware of any actions that were taken?

A: The only action that I would be completely aware of were my own and I did not.

Q: Did you see anything in the file to indicate that anyone had taken any actions at the township?

A: No. And that certainly should not be taken as an indication that there wasn't anything done.

MS. MANGOLD: Should not be?

THE WITNESS: Correct.

BY MS. MILLER:

Q: Who would know if anything was done on these letters? Who would be the best person for me to depose? Who would know if anything was done on Mr. Koresko's letters at the township? Who would be the best person to depose that would know anything - -

A: Well, they were addressed to - - I think you talked about 4 and 2 - - would be depose Mr. Torres or Mr. Pompo to whom the letters were sent.

Q: You have no indication that anything at the township was done on these letters?

A: You must have asked that question like six times and I think I gave you the same answer.

Q: Have you ever spoken to Mr. or Mrs. Koresko?

A: Not that I can recall.

Q: Are you aware of anyone at the township that spoke with Mr. Koresko about this lawsuit?

A: No, I'm not aware of anyone.

Q: I want to make sure there's no - - is there a policy or procedure at the township regarding suspected violations of ordinances or subdivision plan regarding the type of investigation that must be performed?

A: Depends on the circumstance of the violation.

Q: What policy or procedures - -

A: Usually the violation would come to light during the application and review process. The requirements for the subdivision and land development ordinance are generally related to the plan process, so if there's a defect noted, it's usually brought out during the review process.

Q: Is there any policy or procedure, if a defect is discovered, after the plan is finalized?

A: By finalized, you mean recorded?

Q: Yes.

A: No. The applicant - - once that's done, the applicant is entitled to proceed with a subdivision.

Q: Is there a policy or procedure regarding suspected violations of township ordinances, such as the Koreskos had? Is there any policy or procedure within the township to review these matters?

A: Mr. Koresko noted a number of things that he thinks are deficiencies or violations. If you want to pick one, I can. If I haven't already described the process, I'll try to do it again.

Q: Is there a written policy or procedure that if someone at the township received a letter or complaint, such as Mr. Koresko's, that they should follow?

A: There's - -

MS. MANGOLD: I think that Mr. Janasik just said there's a number of problems that Mr. Koresko refers to, alleges in his letter, and I think that you need to be more specific.

THE WITNESS: For example, there was something that wouldn't be regulated by township building code. There's a process in the building code that the inspectors need to follow. If it's something that involves planning and zoning, there's municipality planning code - -

BY MS. MILLER:

Q: Let me go back.

A: Please let me finish. There's also a zoning ordinance that prescribes procedures.

Q: I think that you misunderstood my question and I'm sorry. That's why I wasn't going to have you waste your time. What I was saying, if someone at the township receives a letter such as Mr. Koresko's, is there a written policy or procedure at the township that that person must respond to Mr. or Mrs. Koresko's claims or any way that they must respond to it?

A: There's no general policy.

Q: Okay. On the final subdivision plan, there is a driveway depicted here. Could the person put that driveway anywhere else on that property without giving you notice?

A: If that wasn't me - - if the location was not made a specific condition of approval, then they would not have to notify us.

Q: Can a driveway such as that be put in without a permit?

A: Yes.

Q: Are you aware if a permit was issued in this case?

A: For a driveway?

Q: Yes.

A: Well, we don't have a permit for a driveway.

Q: Did Mr. Lamb discuss with you the constitutional claims in this? Are you aware? Please stop snickering.

A: I don't know what they are.

Q: Did you review the answer to this matter - - the answer to the amended complaint?

A: I may have but if you ask me what the constitutional claims are, I could not tell you what they are.

(Janasik Exhibit No. 13 was marked for identification.)

Q: Is that your signature?

A: I believe it is.

Q: Would you like to review that document and we'll take our break and tell us afterwards if you remember reviewing that document.

(Recess taken at 3:20 p.m.)

BY MS. MILLER:

Q: Back on record. Did you have a chance to review that document?

A: I did.

Q: Have you seen that document before?

A: I believe that I did. I signed it.

Q: Do you remember exactly reviewing it but I'm sure that I skimmed through, did not commit it to memory.

Q: Could you go to paragraph 13. Reading the last sentence of 14, are you aware of any numerous advertised public meetings regarding the subdivision of this property?

A: Well, I'm not sure that that's what that says. I think that the subdivision review process doesn't require notification of specific meetings or announcements. I think, the way I read this, the meetings of the planning commission are advertised at the beginning of the year and in newspapers in general circulation. They're also advertised or notices on our web site. We have agendas that are published on our website and I think that's what it refers to.

Q: Was this subdivision discussed at more than one public meeting?

A: I don't know the answer to that.

Q: Would you go to the paragraph 36. What can you describe regarding the prior illegal installation of the propane tanks?

A: What can I describe?

Q: Yes. Can you describe anything? What - - the term "any prior illegal installation of the propane tanks that

has since been remedied," what steps did the township take to remedy this prior illegal - - alleged illegal installation?

A: I think that involved Mr. Pilotti and the correspondence that you showed me before. It was essentially Michael Pilotti who had the tanks removed and installed properly. He personally didn't remove them, obviously.

Q: Would you look at paragraph 95.

A: Okay.

Q: Would you look at paragraph 100.

A: Okay.

Q: Why did you say that this complaint "contemplates a private cause of action in trespass"?

A: Why did I say that?

Q: Yes. Why - - you verified this. Is there a reason why you think it's a private cause of action in trespass?

A: Yeah, because I was - - I was advised to say that by or to verify it and I'm assuming that my attorney - -

MS. MANGOLD: Virginia, it's a legal conclusion. You can ask him factual questions about this but you're asking him to identify a legal cause of action. Mr. Janasik is clearly - -

MS. MILLER: One follow-up question.

BY MS. MILLER:

Q: Are you aware of any constitutional claims that were made against the township? In this action, are you aware of any constitutional claims that were made against the township, any factual basis or any allegations regarding a constitutional claim?

A: I don't know. Do you want to show me what these answers respond to?

Q: Did you review the amended complaint in this case at all?

A: Yes. I don't recall what it said. Is there a point to that question?

MS. MANGOLD: You know, don't worry about it.

THE WITNESS: I have a lot of things to do, okay. If you want to ask me something that I can answer, that I am capable of answering and something that is relevant, I would be happy to do that but please don't waste my time with this. I don't get paid by the hour.

MS. MILLER: I will follow up with one and I know that you will object to it.

BY MS. MILLER:

Q: Did Mr. Lamb tell you that Mr. Koresko might have waived some of his constitutional claims against the township?

MS. MANGOLD: Objection. Don't answer that. Attorney/client privilege.

BY MS. MILLER:

Q: Did Mr. Lamb explain to you the conflict of interest in this case?

MS. MANGOLD: Don't answer that question. Attorney/client privilege

BY MS. MILLER:

Q: Did Mr. Lamb ever tell you that he also represented Mr. Koresko?

MS. MANGOLD: Same objection.

BY MS. MILLER:

Q: Do you take an oath of office at all with your position?

A: Yes.

Q: What's your oath of office?

A: Gee, I didn't memorize it.

Q: Just the basic. I will not ask for - -

A: To obey the laws of the State of Pennsylvania, constitution of the United States, the laws of Tredyffrin Township.

Q: Would you be concerned if someone told you that someone, in fact, an attorney told you that some of your ordinances and possibly some of your subdivision plans

might run afoul of the Pennsylvania Constitution and the U.S. Constitution?

A: If the person was credible, I suppose I would.

Q: Would you investigate those claim?

A: I would have to make a determination as to whether there's any substance.

Q: Did you investigate the claims in this case?

A: No.

Q: If you will let me go through just a couple of things here, I will be done.

A: Great.

Q: Would you go to paragraph 110. Does the township owe any duty to the plaintiffs in this case?

MS. MANGOLD: I will object. I would like to see the amended complaint, to see what that's referring to.

MS. MILLER: This is actually a new matter. I don't believe that you're referring to anything on that.

MR. YAW: It's a conclusion of law.

BY MS. MILLER:

Q: Does the township have a duty to its citizens?

A: In what respect?

Q: Does it have any duty to its citizens?

A: Yes.

Q: What would you say is the basic duty of the township to its citizens?

A: I think that we have a lot of duties. Do you want to go through a list, and I'll say yes or no, if we have a responsibility?

Q: Okay. Does the township have a duty to investigate safety matters?

MS. MANGOLD: Under what circumstances?

BY MS. MILLER:

Q: I'm saying basic safety matters.

A: We have a duty to provide for the safety of our citizens.

Q: Does the township have a duty to investigate suspected violations of ordinances?

A: Not necessarily.

MR. YAW: Objection as to form. Asked and answered.

MS. MILLER: I thing that we're done with you. I have one housekeeping thing that I want to put on the record.

If you want to allow Mr. Janasik to go, that's fine.

MS. MANGOLD: Do you have any questions?

- - -

EXAMINATION

- - -

BY MR. YAW:

Q: Mr. Janasik, my name is Scott Yaw. I will ask you one question

In reviewing Janasik No. 6, do you see any condition or note on that plan that requires the saving of any particular tree?

A: No.

Q: Thank you.

A: There's nothing on there.

MS. MANGOLD: No questions.

MS. MILLER: One housekeeping thing. If you want him to leave - - actually, it's something

that happened the other day. I want to make sure this goes on the record. It's become an issue again. I believe everyone is aware that I put a letter to Judge Shenkin at our conference regarding it. I'm a major in the Air National Guard, 193rd Special Operations Wing. I provided a letter to Judge Shenkin and all present at that hearing regarding my military obligation. If there's any question on that obligation, there was a number there to call.

Since 9-11, I've spent over 100 days on active duty, and if there's a problem and I go away again, you are to contact either my local counsel or Mr. Koresko, whoever is available, because I guess there was some question that no one is really aware of what the Guard is. It was mentioned - - 9-11, two towers, they both collapsed, because you don't seem to understand. I put this on directly - -

MS. MANGOLD: What I don't understand?

MS. MILLER: I want to make sure, because of the documents that I received, that I'm under immediate deployment orders and that was discussed at that point.

MS. MANGOLD: Let me interrupt. I think that you're probably talking about our answer to your motion to disqualify Lamb. I want to discuss it. You're obviously insulting my character, once again, Virginia. Listen to me a second. If you're talking about Joel Frank's affidavit, I had nothing to do - -

MS. MILLER: I don't want to discuss that. I want to make sure that you're aware - - and right now, once again, and it wasn't necessarily that way for the last two months, because I thought that I was home. I called Scott to tell him that I would not be going away. I'm under 24 hours - - if I get a call, myself and my materials are back over in a Middle Eastern location, so if there's a question and you cannot get a hold of me, you will either contact my local counsel or you will contact Mr. Koresko. That's all I wanted to put on the record.

MR. YAW: Who's your local counsel?

MS. MILLER: There is a local counsel that's going to probably be entering in Montgomery County.

MR. YAW: Who is it?

MS. MILLER: I'm not sure who's going to accept.

MS. MANGOLD: Is there a local counsel in our case?

MS. MILLER: Not as of yet. Mike Connelly can be contacted. Mr. Koresko will be the primary focal point. The reason why I'm putting this on, if you haven't gotten it, I can't tell you that I may be leaving soon but what I'm saying to you is I may be leaving soon.

MS. MANGOLD: That's fine, Virginia. I am just taken aback by the insinuation that - -

MS. MILLER: I want to make sure that there's no question. There seemed to be a question that you were not aware that I was in the Guard, that you were not aware that I was subject to immediate deployment.

MS. MANGOLD: Once again, if you had read Mr. Frank's affidavit correctly, he was never made aware. I never said that. I never attested to that. Nobody in our case - -

MS. MILLER: I want to make sure that there's no question on that.

MS. MANGOLD: Fine.

MS. MILLER: Right now, if I have to leave right before this trial, I don't want there to be an question of whom should be contacted.

MS. MANGOLD: Fine.

MS. MILLER: Okay.

(Proceedings were concluded at 3:50 p.m.)

CERTIFICATE

I, PAQUITO Z. FORONDA, being a court reporter for Chester County, do hereby certify that the foregoing oral testimony of JOSEPH JANASIK was taken stenographically by me on 10 September 2002, after the said witness was duly sworn or affirmed prior to the commencement of his testimony; and that this deposition transcript is a true and correct transcript of the same, fully transcribed under my direction, to the best of my ability and skill.

I further certify that I am not a relative, employee or attorney of any of the parities in this action; that I am not a relative or employee of any attorney in this action: and that I am not financially interested in the event of this action.

_____

Paquito Z. Foronda, RMR

Official Court Reporter

I have read the foregoing transcript of my deposition given on September 10, 2002, and it is true, correct and complete, to the best of my knowledge, recollection and belief, except for the corrections noted and/or list of corrections, if any, attached on a separate sheet herewith.

_____

JOSEPH JANASIK

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IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA

John J. Koresko, V., et al.
Plaintiffs,

V NO. 01-05343

Mark Farley, et al.
Defendants.

ORDER

AND NOW, this date of ,2002, upon consideration of Plaintiffs' Motion to Disqualify Lamb, Windle & McErlane, P.C. Counsel for Defendant Township of Tredyffrin, and Defendants response thereto, it is hereby ORDERED that said Motion is GRANTED and that Defendant Township of Tredyffrin shall pay Plaintiffs' cost and attorneys fees related to the filing of this Motion.

BY THE COURT

_____

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IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA

John J. Koresko, V., et al.

Plaintiffs,

NO. 01-05343

v.

Mark Farley, et al.

MOTION TO DISQUALIFY LAMB, WINDLE & McERLANE, P. C.,

COUNSEL FOR DEFENDANT TOWNSHIP OF TREDYFFRIN

Plaintiffs John J. Koresko, V and Bonnie J. Koresko, by and through their undersigned counsel, hereby file this Motion to Disqualify Lamb, Windle & McErlane, P.C. (hereinafter the "LWM Firm") from further representation in this action of Defendant Township of Tredyffrin, and in support thereof, aver the following:

On July 17, 2000, Plaintiffs John J. Koresko, V. (hereinafter "Koresko"), as sole shareholder of Koresko & Associates, P. C., initiated an action in the Court of Common Pleas, Chester County, Pennsylvania, against Mark Farley captioned, Koresko & Associates, P.C. v. Mark Farley (hereinafter the "Collection Action"), and asserting causes of action relating to the indexing of a judgment against Mark Farley at a property he owned at 1175 to 1185 Seaton Ross Road, Radnor, Tredyffrin Township, Chester County, Pennsylvania (hereinafter the "1185 Property").

In June 2001, the LWM Firm was retained by Koresko to serve as co-counsel in the Collection Action. On June 21, 2001, the LWM Firm entered its appearance on behalf of Koresko, and appeared at a hearing in the Collection Action on behalf of Koresko.

As part of the LWM Firm's representation of Koresko in the Collection Action, attorneys at LWM Firm were privy to confidential attorney/client communications relating to the 1185 Property and the Collection Action.

In addition, the LWM Firm understood that because their co-counsel in the Collection Action, Virginia Miller, Esquire, is a Major in a Special Operations Combat C130 Air National Guard unit that is subject to immediate deployment at any time, if attorney Miller was called to active duty, the LWM Firm would serve as primary counsel in the Collection Action. This back-up became essential after the events of September 11, 2001. Since September 11, 2001, attorney Miller deployed twice to an overseas combat zone and spent over 100 days on active duty in support of Enduring Freedom

The Collection is still pending.

On June 25, 2001, Koresko and Bonnie J. Koresko initiated the present action against several Defendants, including the Township of Tredyffrin, alleging causes of action arising from development at the 1185 Property, including trespass, unlawful removal of trees, violation of various ordinances, unlawful subdivision plan, improper installation of unlawful propane tanks, and the failure to observe setback requirements (hereinafter the Seaton Ross Action").

The Seaton Ross Action names the Township of Tredyffrin (hereinafter the "Township") as a Defendant as a result of its actions and inaction relating to the 1185 Property.

Koresko was aware that LWM Firm was counsel for the Township in various matters.

Knowing that the Township would be a defendant in the Seaton Ross Action, Koresko sought a meeting with the LWM Firm to discuss the allegation against the Township in the Seaton Ross Action, and the LWM Firm's possible representation of the Township in that action.

On or around June 25, 2001, a meeting took place at the offices of the LWM Firm, that included attorneys William H. Lamb, Esquire and Vince Pompo, Esqiure, form the LWM Firm, that included attorneys William H. Lamb, Esquire and Vince Pompo, Esquire, from the LWM Firm, counsel for Koresko, Virginia Miller, Esquire, and Koresko who participated via telephone.

At the June 25, 2001 meeting, Koresko and attorney Miller were advised by the LWM Firm would be representing the Township in the Seaton Ross Action.

Koresko raised the issue of the potential conflict of interest in the LWM Firm's representation of an adverse party (the Township) while representing Koresko in the Collection Action. Koresko sought, and received assurances from the LWM Firm that the Township would take only a passive role in the disputes which are the subject of the Seaton Ross Action, would take no action against the interests of Koresko in

the Seaton Ross Action, and that the Township would not issue any new permits relating to the 1185 Property.

At the June 25, 2001 meeting, Koresko agreed that he would waive the conflict in the LWM Firm's representation of Ko

resko in the Collection Action, and the Township in the Seaton Ross Action, as long as no actions were taken by the LWM Firm and the Township in the Seaton Ross Action that would be adverse to the interests of Koresko.

In August, 2002, however, it became apparent that the Township, and more egregiously, the LWM Firm, were taking actions directly against the interest of Koresko, and contrary to the agreements reached on June 25, 2001, including:

At a deposition of August 5, 2002, the Township revealed that in May 2002, Farley requested permits for the 1185 Property, various correspondence ensured, and that the Township had issued permits relating the removal/relocation of the propane tanks, and that the tanks had been relocated. Despite the fact that this issue is central to the dispute in the Seaton Ross Action, the Township issued the permit in violation of the agreement made by the LWM Firm, and failed to disclosure this information to Plaintiffs.

That contrary to the agreement reached on June 25, 2001 that the LWM Firm and the Township would take no action in the Seaton Ross Action adverse to the interests of Koresko, it became apparent that LWM Firm was, in coordination with counsel for the other Defendant, determining whether clearly relevant documents should be produced to Koresko.

The actions by the LWM Firm that were disclosed on August 5, 2002, made it apparent that the Township, and the LWM Firm were no longer taking a passive role in the Seaton Ross Action, and had breached the agreement reached on June 25, 2001.

If there was any doubt as to the newly revealed adversarial relationship between the Township and Koresko, it was eliminated when on August 7, 2002, William H. Lamb, Esquire, of the LWM Firm forwarded a letter to Koresko enclosing the Township's Answer to the Amended Complaint, and advising that attorney Lamb believed the Amended Complaint as it relates to the Township was frivolous lawsuit, and attorney Lamb threatened a Dragonetti action.

In response to the August 7, 2002 letter, Koresko wrote to the LWM Firm taking exceptions to attorney Lamb's characterizations of the causes of action in the Seaton Ross Action, setting forth the legal basis for the claims against the Township, and advising that the actions of the LWM Firm was representing the Township in an action that was now directly adverse to the interests of Koresko, while continuing to represent Koresko in the Collection Action, Koresko ask the LWM Firm to withdraw as counsel for the Township in the Seaton Ross Action.

In response to Koresko's August 7, 2002 letter, the LWM Firms advised that its recollection of the agreements reached on June 25, 2001, differed from Koresko's, that it would not resign as counsel for the Township in the Seaton Ross Action, but apparently recognizing the conflict of interest, advised that it was going to withdraw as counsel for Koresko in

the Collection Action. (See letter of Aug. 12, 2002, attached to the Affidavits of Virginia Miller, Esq., ("Miller Aff."), as Ex "7").

On August 12, 2002, Koresko wrote to the LWM Firm and took issue with its attempt to resolve the conflict by withdrawing from the Collection Action.

On August 12, 2002, the LWM Firm wrote to Koresko enclosing its Withdrawal of Appearance as counsel for Koresko in the collection Action, and advising that the withdraw was necessitated because a "dispute has arisen" between Koresko and the LWM Firm

Telling, on August 14, 2002, the LWM Firm in response to Koresko's August 12, 2002 letter, stated that its decision to drop Koresko as opposed to the Township was motivated by its long relationship with the Township verses representing Koresko in a "very small matter". (See letter of Aug. 14, 2002, attached to the Miller Affidavit, as Ex. "10").

It is well settled in Pennsylvania law that a conflict of interest exists when an attorney attempts to represent clients with adverse interests, and the attorney can only enter into the duel representation if the conflict is waived by both clients. As such, the LWM Firm could have only accepted the representation of Koresko in the Collection Action, and the Township in the Seaton Ross Action, if both clients had waived the conflict. The agreements reached on June 25, 2001, constituted a conditional waiver of the conflict by Koresko.

As result of the actions of the Township and the LWM Firm that were revealed in August 2002, Korekso's conditional waiver of the conflict was withdrawn.

By withdrawing as counsel for Koresko in the Collection Action, the LWM Firm has not eliminated the conflict, and is in violating of 42 Pa. Cons. Stat. Ann. Rules of Prof l Conduct 1.9.

For the reasons stated herein and the accompanying Memorandum of Law in Support, this Court should disqualify the LWM firm from this matter.

WHEREFORE, plaintiffs hereby respectfully request that this Honorable Court grant their Motion for Disqualification of the firm Lamb, Windle & McErlane, P.C., preclude Lamb, Windle & McErlane, P.C. from any further representation, or contact with the Township of Tredyffrin in relation to this action, that plaintiffs be awarded costs and attorney's fees relating to the filing of this motion, and such further relief as this Court deems just and proper.

Dated: August27, 2002

Respectfully submitted,

By: _____

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IN THE COURT OF COMMON PLEAS
OF CHESTER COUNTY, PENNSYLVANIA
John J. Koresko, V., et al.

Plaintiffs,

Mark Farley, et al.

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISQUALIFY LAMB, WINDLE & McERLANE, P.C., COUNSEL FOR DEFENDANT TOWNSHIP OF TREDYFFRIN

Plaintiffs John J. Koresko, V and Bonnie J. Koresko, by and through their undersigned counsel, hereby file this Memorandum of Law in Support of their Motion to Disqualify Lamb, Windle & McErlande, P.C. (hereinafter the "LWM Firm") from further representation in this action of Defendant Township of Tredyffrin (hereinafter the "Township").

I. FACTUAL BACKGROUND

On July 17, 2000, Plaintiff John J. Koresko, V. (hereinafter "Koresko"), as sole shareholder of Koresko & Associates, P.C. initiated an action in the Court of Common Pleas, Chester County, Pennsylvania, against Mark Farley captioned, Koresko & Associates, P.C. v. Mark Farley (hereinafter the "collection Action") and asserting causes of action relating to the indexing of a judgment against Mark Farley at a property he owned at 1175 to 1185 Seaton Ross Road, Radnor, Tredyffrin Township, Chester County, Pennsylvania (hereinafter the "1185 Property"). In June 2001, the LWM Firm was retained by Koresko to serve as co-counsel in the Collection Action. On June 21, 2001, the LWM Firm entered its appearance on behalf of Koresko, and appeared at a hearing in the Collection Action on behalf of Koresko. As part of the LWM Firm's representation of Koresko in the Collection Action, attorneys at the LWM Firm were privy to

confidential attorney/client communications relating to the 1185 Property and the Collection Action.

In addition, the LWM Firm understood that because their co-counsel in the Collection Action; Virginia Miller, Esquire, is a Major in a Special Operations Combat C130 Air National Guard unit that is subject to immediate deployment at any time, if attorney Miller was called to active duty, the LWM Firm would serve as primary counsel in the Collection Action. This back-up became essential after the events of September 11, 2001. Since September 11, 2001, attorney Miller deployed twice to an overseas combat zone and spent over 100 days on active duty in support of Enduring Freedom. The Collection Action is still pending.

On June 25, 2001, Koresko and Bonnie J. Koresko initiated the present action against several Defendants, including the Township of Tredyffrin, alleging causes of action arising from development at the 1185 Property, including trespass, unlawful removal of trees, violation of various ordinances, unlawful subdivision plan, improper installation of unlawful propane tanks, and the failure to observe setback requirements (hereinafter the Seaton Ross Action"). The Seaton Ross Action names the Township of Tredyffrin (herein the "Township") as a Defendants as a result of its actions and inaction relating to the 1185 Property.

Koresko was aware that the LWM was counsel for the Township in various matters. Knowing that the Township would be a Defendant in the Seaton Ross Action, and aware that the LWM Firm was privy to confidential information in the Collection Action, Koresko sought a meeting with

the LWM Firm to discuss the allegation against the Township in the Seaton Ross Action, and the LWM Firm's to discuss the allegation against the Township in the Seaton Ross Action, and the LWM Firm's Possible representation of the Township in that action.

On or around June 25, 2001, a meeting took place at the offices of the LWM Firm, that included attorneys William H. Lamb, Esquire, and Vince Pompo, Esquire, from the LWM Firm, counsel for Koresko, Virginia Miller, Esquire, and Koresko who participated via telephone. At the June 25, 2001 meeting, Koresko and attorney Miller were advised by the LWM Firm that the LWM Firm would be representing the Township in the Seaton Ross Action. Koresko raised the issue of the potential conflict of interest in the LWM Firm's representation of an adverse party (the Township) while representing Koresko in the Collection Action. Koresko sought, and received assurances from the LWM Firm that the Township would take only a passive role in the disputes which are the subject of the Seaton Ross Action, would take no action against the interests of Koresko in the Seaton Ross Action, and that the Township would not issue any new permits relating to the 1185 Property.

At the June 25, 2001 meeting , Koresko agreed that he would waive the conflict in the LWM Firm's representation of Koresko in the Collection Action, and the Township in the Seaton Ross Action, as long as no actions were taken by the LWM Firm and the Township in the Seaton Ross Action that would be adverse to he interests of Koresko.

In August, 2002, however, it became apparent that the Township, and more egregiously, the LWM Firm, were tak-

ing actions directly against the interest of Koresko, and contrary to the agreements reached on June 25, 2001, including:

Ata deposition on August 5, 2002, the Township revealed that in May 2002, Farley requested permits for the 1185 Property, various correspondence ensued, and that the Township had issued permits relating to the removal/relocation of the propane tanks, and the tanks had been relocated. Despite the fact that this issue is central to the dispute in the Seaton Ross Action, the Township issued the permit in violation of the agreement made by the LWM Firm, and failed to disclosure this information to Plaintiffs.

That contrary to the agreement reached on June 25, 2001, that the LWM Firm and the Township would take no action in the Seaton Ross Action adverse to the interests of Koresko, it became apparent that the LWM Firm was, in coordination with counsel for other Defendant, determining whether clearly relevant documents should be produced to Koresko.

If there was any doubt as to the newly revealed adversarial relationship between the Township and Koresko, it was eliminated when on August 7, 2002, William H. Lamb, Esquire, of the LWM Firm forwarded a letter to Koresko enclosing the Township's Answer to the Amended Complaint, ad advising that attorney Lamb believed the Amended Complaint as it relates to the Township was a frivolous lawsuit, and attorney Lamb threatened a Dragonetti action. (See letter of Aug. 7, 2002, Miller Aff., Ex. "5").

In response to the August 7, 2002 letter, Koresko wrote to the LWM Firm taking exception to attorney Lamb's characterizations of the causes of action in the Seaton Ross Action, setting forth the legal basis for the claims against the Township, and advising that the actions of the LWM Firm were in conflict with the agreement reached on June 25, 2001. Because the LWM Firm was representing the Township in an action that was now directly adverse to the interests of Koresko, while continuing to represent Koresko in the Collection Action (See letter of Aug. 12, 2002, Miller Aff., Ex. "7").

On August 12, 2002, Koresko wrote to the LWM Firm and took issue with its attempt to resolve the conflict by withdrawing from the Collection Action. (See letter of Aug. 12, 2002, Miller Aff. Ex. "8"). On August 12, 2002, the LWM Firm wrote to Koresko enclosing its Withdraw was necessitated because a "dispute has arisen" between Koresko and the LWM Firm. (See letter of Aug. 12, 2002, Miller Aff., Ex. "9").

Tellingly, on August 14, 2002, the LWM Firm in response to Koresko's August 12, 2002 letter, stated that its decision to drop Koresko as opposed to the Township was motivated by its long relationship with the Township verses representing Koresko in a "very small matter". (See letter of Aug. 14, 2002, Miller Aff.. Ex. 10).

II ARGUMENT

A. Pursuant To the Pennsylvania Rules Of Professional Conduct, An attorney Cannot Represent Clients with Interests That are Adverse, And As Such, The LWM Firm's Representation Of Koresko And The Township Could Have Only Occurred If There Was A Waiver Of the Conflict.

Pennsylvania Rule of Professional Conduct 1.7(a)

States:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client unless;
>
> > (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
> >
> > (2) Each client consents after consultion.

42 Pa. Cons. Stat. Ann. Rules of Prof I Conduct 1.7(a).

Having agreed to the representation Of Kerosko in the collection Action, Rule 1.7

Prohibits the LWM Firm from representing any Client that would be directly adverse to Koresko Unless the LWM Firm reasonably believed the New representation would not be adversarial to Koresko, and Koresko and the new client each Consent after consultation. As such, the LWMFirm could have only accepted the representation of the township in the Seaton Ross Action of the Township was not going to be adverse to Koresko and the Township consented.

As set forth supra, Koresko gave said consent, but only conditionally based upon certain assurances from the LWM Firm, including an assuarance that the Township and the LWM Firm would not taken any action adverse to the interest of Koresko. As a result of the actions by the Township and the LWM Firm that were disclosed in August, 2002, the LWM Firm violated the conditions of Koresko's waiver of the conflict. No longer having the consent

required by Rule 1.7(a)(2), and since the interests of the Township were now directly adverse to those of Koresko, the LWM Firm's obligation was to withdraw as counsel.

Instead of withdrawing as counsel for the Township, but in apparent recognition of the conflict of interests, the LWM Firm withdrew as counsel for Koresko in the Collection Action. However, "an attorney may not drop one client like a "hot potato" in order to avoid a conflict with another, more remunerative client." International Longshoreman's Ass'n Local Union 1323 v. International Longshoreman's Ass'n, 909 F. Supp. 287, 293 (E. D. Pa 1999).

The fact that the decision as to what client would be dropped was based upon remunerations was made clear by William H. Lamb, Esquire's August 14, 2002 letter, wherein he started that his refusal to withdraw as counsel for the Township was based upon his upon his considering the Collection Action "a very small matter" in comparison to his relationship with the Township. (See letter of Aug. 14, 2002, Miller Aff. Ex. "10").

Obviously, the Rules of Professional Conduct do not provide that an attorney's decision as to which client he will represent after a conflict arises can be based upon the size of the matter, or the years of service to a particular client. When a conflict arises after representation, whether a lawyer can continue to represent either of the clients is determined by Pennsylvania Rule of Professional Conduct 1.7 (See Comments to Rule 1.7).

The LWM Firm's Refusal To Withdraw As Counsel For The Township In The Seaton Ross Action Is In Violation Of Pennsylvania Rule of Professional Conduct 1.9.

When the LWM Firm withdrew as counsel for Koresko in the Collection Action, it did so in apparent recognition of the conflict of interest in its continued representation of Koresko in the Collection Action and the Township in the Seaton Ross Action. The LWM Firm's dropping of Koresko like a "hot potato" in an attempt to eliminate the conflict was inappropriate. However, having withdrawn from representation of Koresko, whether the LWM Firm can continue to represent the Township in the Seaton Ross Action is governed by Rule 1.9. Rule 1.9 states:

A Lawyer who has formerly represented a client in a matter shall not thereafter:

> represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after a full disclosure of the circumstances and consultation: or use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally knew.

42 Pa. Cons. Stat Ann. Rules of Prof I Conduct 1.9.

As such, whether the LWM Firm can continue to represent the Township is a question of whether the Seaton Ross Action is a substantially related matter" in which the Township's interest are mutually adverse to Koresko's interest. Since the interests of the Township are adverse to Koresko's in the Seaton Ross Action, the only issue for determination is if the Seaton Ross Action is a substantially related matter to the Collection Action. To determine whether the two actions are substantially related matters, the court examines the nature and scope of representation in the action in which the attorney has withdrawn, the nature of the action against the former client, and inquires as to whether in the course of prior representation, the former client might have disclosed confidences which could be relevant to the action against the former client. Brennon v. Independence Blue Cross, 949 F. Supp. 305 (E. D. Pa. 1996). If the attorney 'might have acquired confidential information relating to the subject matter of his subsequent representation, then Rule 1.9 would prevent the attorney from representing the second client.

Commonwealth Insurance Company v. Graplix Hot Line, Inc., 808 F. Supp. 1200 (E.D. Pa. 1992), citing Richardson v. Hamilton Int'l. Corp., 469 F. 2d 1382 (3rd Cir. 1972), cert. Denied, 411 U.S. 986 (1973). Any doubts as to the existence of a violation of the rules should be resolved in favor of disqualification. J & J Snack Foods Corp. v. Kaffrisen, No. 98-5743, 2000 WL 562736 (E. D. Pa. May 9, 2000).

As set forth in the Affidavit of Virginia Miller, both the Collection Action and the Seaton Ross Action relate to the 1185 Property. (See Miller Aff. Para. 3 and 10). Attorney Miller states in her Affidavit that as counsel for Koresko in

the Collection Action, the LWM Firm was privacy to confidential attorney/client information of a nature that could be utilized by the Township in the Seaton Ross Action. As such, the Collection Action and the Seaton Ross Action are substantially related matters, and pursuant to Rule 1.9, the LWM Firm must withdraw as counsel for the Township in the Seaton Ross Action.

III. CONCLUSION

Counsel is fully cognizant that a motion to disqualify opposing counsel is a serious matter. However, given the disclosure of confidential information to the LWM Firm; information that both counsel and Koresko believe can be adverse to the interests of Koresko in the Seaton Ross Action, and given the LWM Firm's refusal to withdraw, counsel is left with no option but to file this Motion before a trial date is set and in an effort to have this court address this matter in a timely manner that will not delay these proceedings. It is respectfully requested that the LWM Firm be disqualified and that it be ordered to have no further contact with the Township with regard to the Seaton Ross Action.

Respectfully submitted

Dated: August 27, 20

By: _____

Virginia I. Miller, Esq. (I. D. No. 85361)
ANDERSON KILL & OLICK, P.C.
1600 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 568-4202
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the Motion to Disqualify Lamb, McErlande, Windle & McErlane, P.C. and Memorandum of Law in Support were served on the following Federal Express.

Scott E. Yaw, Esquire
Robert W. Lentz, Esquire
Lentz, Cantor, & Massey, Ltd.
Chester County Commons
20 Mystic Lane
Malvern, PA 193555-1942
Attorney for Defendants Mark Farley and Seaton Ross, L. P.

Wayne W. Congar, Esquire
Wayne W. Congar & Associates, PC
1548 McDaniel Drive
West Chester, PA 19380-7028
Attorney for Township of Tredyffrin

Susan C. Mangold, Esquire
Lamb, Windle & McErlane, PC
24 East Market Street
P.O. Box 565
West Chester, PA 19381
Attorney for Defendant Ollie Bower

John J. Koresko, Esquire
Koresko & Associates
500 Gulph Road

Suite 110
King of Prussia, PA 19406

Virginia I. Miller, Esquire
Attorney For Plaintiffs

Dated: August 27, 2002

IN THE COURT OF COMMON PLEAS OF CHESTER, COUNTY, PENNSYLVANIA

John J. Koresko, V., et al.

Plaintiffs,

V. NO. 01-05343

Mark Farley, et al.

Defendants.

AFFIDAVIT OF

VIRGINIA I. MILLER, ESQUIRE

COMMONWEALTH OF PENNSYLVANIA

COUNTY OF PHILADELPHIA ss

I, Virginia I. Miller, being duly sworn according to law, hereby depose and state the following:

I am an attorney at law, admitted to practice law in New Jersey and in Pennsylvania.

During the relevant time periods, I was counsel to Koresko & Associates, P.C.

On July 17, 2000, Plaintiff John J. Koresko, V. (hereinafter "Koresko"), as sole shareholder of Koresko & Associates, P.C. initiated an action in the Court of Common Pleas, Chester County, Pennsylvania, against Mark Farley, captioned Koresko & Associates, P.C. v. Mark Farley (hereinafter the "Collection Action"), and asserting causes of action relating to the indexing of a judgment against Mark Farley at a property he owned at 1175 to 1185 Seaton Ross Road, Radnor, Tredyffrin Township, Chester County, Pennsylvania(hereinafter the "1185 Property").

In June 2001, the LWM Firm was retained by Koresko to serve as co counsel in the Collection Action. On June 21, 2001, the LWM Firm entered its appearance on behalf of Koresko, and appeared at a hearing in the Collection Action on behalf of Koresko.

As part of the LWM Firm's representation of Koresko in the Collection Action, attorneys at the LWM Firm were privy to confidential attorney/client communications relating to the 1185 Property and the Collection Action.

The LWM Firm understood that because I am a Major in a Special Operations Combat C130 Air National Guard Unit that is subject to immediate deployment at any time, if I was called to active duty, the LWM Firm would serve as primary counsel in the Collection Action.

This back-up became essential after the events of September 11, 2001.

Since September 11, 2001, I have deployed twice to an overseas combat zone and spent over 100 days on active duty in support of Enduring Freedom.

The Collection Action is still pending.

On June 25, 2001, Koresko and Bonnie J. Koreso initiated the present action against several Defendants, including the Township of Tredyffrin, alleging causes of action arising from development at the 1185 Property, including trespass, unlawful removal of trees, violation of various ordinances, unlawful subdivision plan, improper installation of unlawful propane tanks, and the failure to observe setback requirements (hereinafter the "Seaton Ross Action").

The Seaton Ross Action names the Township of Tredyffrin (hereinafter the "Township"") as a Defendant as a result of its actions and inaction relating to the 1185 Property.

Koresko was aware that the LWM Firm was counsel for the Township in various matters.

Knowing that the Township would be a Defendant in the Seaton Ross Action, and aware that the LWM Firm was privy to confidential information in the Collection Action, Koresko sought a meeting with the LWM Firm to discuss the allegation against the Township in the Seaton Ross Action, and the LWM Firm's possible representation of Township in that action.

On or around June 25, 2001, a meeting took place at the offices of the LWM Firm, and myself. Koresko participated via telephone.

At the June 25, 2001 meeting, Koresko and I were advised by the LWM Firm that the LWM Firm would be representing the Township in the Seaton Ross Action.

Koresko raised the issue of the potential conflict of interest in the LWM Firm's representation of an adverse party (the Township) while representing Koresko in the Collection Action. Koresko sought, and received assurances from the LWM Firm that the Township would take no action against the interests of Koresko in the Seaton Ross Action, and that the Township would not issue any new permits relating to the 1185 Property. (See letter of Dec. 12, 2001; attached as Ex. "1").

At the June 25, 2001 meeting, Koresko agreed that he would waive the conflict in the LWM Firm's representation of Koresko in the Collection Action, and the Township in the Seaton Ross Action, as long as no actions were taken by the LWM Firm and the Township in the Seaton Ross Action that would be adverse to the interest of Koresko.

On or about July 16, 2001, I entered an appearance in the Seaton Ross Action.

In August, 2002, however, it became apparent that the Township, and more egregiously, the LWM Firm, were taking actions directly against the interest of Koresko, and contrary to the agreements reached on June 25, 2001 including:

At a deposition on August 5, 2002, the Township revealed that in May 2002, Farley requested permits for the 1185 Property, various correspondence ensued, and that the Township had issued permits relating to the removal/relocation of the propane tanks, and that the tanks had been relocated. Despite the fact that this issue is central to the dispute in the

LWM Firm. (See letter of Aug. 12, 2002, attached as Ex. "9").

Tellingly, on August 14, 2002, the LWM Firm in response to Koresko's August 12, 2002 letter, stated that its decision to drop Koresko as opposed to the Township waive motivated by its long relationship with the Township verses representing Koresko in a "very small matter". (See letter of Aug. 14, 2002, attached as Ex. "10').

As a result of the actions of the Township and the LWM Firm that were revealed in August 2002, Koresko's conditional waiver of the conflict was withdrawn.

By withdrawing as counsel for Koresko in the Collection Action, there LWM Firm has not eliminated the conflict.

All Exhibits attached are true and correct copies.

_____

VIRGINIA MILLER, Esquire

Subscribed and sworn before me this 22nd day of August 2002.

NOTARY PUBLIC

VIA FACSIMILE
Susan Mangold, Esquire
Lamb, Windle & McErlane, P.C.
24 East Market Street
Box 565
West Chester, PA 19381

Re: Koresko v. Farley et al; CCP No. 01-05343

Chester County, PA

Dear Ms. Mangold:

I am in receipt of your letter dated December 11, 2001 and the enclosures. I wish to address and clarify certain matters addressed in the letter and enclosures.

First, the certificate of service does not list John J. Koresko, Esquire. Mr. Koresko has entered an appearance on behalf of the Plaintiffs. Mr. Koresko has not withdrawn said appearance. Accordingly all filings should also be served on Plaintiffs' co-counsel Mr. Koresko.

Secondly, this matter was filed after discussion and agreement with your office on behalf of your client, the Township of Tredyffrin. On June 25, this meeting took place at your offices with Bill Lamb, Vince Pompo, and myself present. John Koresko was present via telephone conferencing. Mr. Koresko and I discussed with your firm the pending litigation and the imminent closing on the property.

Understanding the immediacy of the situation, your firm stated that no further permits would be issued. In consideration for our not pursuing the Township and other further remedies against the Township, your offices as agent for the Township agreed to undertake certain matters. Mr. Lamb indicated that his offices and the Township would fully cooperate in this matter and fully investigate the alleged defects in the subdivision. Additionally in consideration for not bringing a 1983 action and seeking other possible remedies, you pledged your cooperation in ensuring no permits were issued. Your firm indicated that it would check the status of the permits with the Township. Unfortunately, permits did issue.

Additionally at that meeting I produced copies of the said complaint in this matter. I personally gave Mr. Lamb and Mr. Pompo copies of the complaint. I was told at that time that your firm would accept service of the Complaint. I also forwarded a court stamped copy of the Complaint to your offices along with the Acceptance of Service. Today in the mail after almost six months I received the completed acceptance of service dated December 11, 2001.

In conversations with Vince Pompo, he indicated that your firm would not dispute service. After our conversations yesterday, I do not feel comfortable that your office will not dispute service. I want the written assurances of your firm that you will not dispute service and that the effective date of service was June 25, 2001.

If you have any questions, please contact me.

Sincerely,

Virginia I. Miller

Cc: John J. Koresko V, Esquire
William H. Lamb, Esquire
Vincent M. Pompo, Esquire

VIA FACSIMILE
Susan Mangold, Esquire
Lamb, Windle & McErlane, P.C.
24 East Market Street
Box 565
West Chester, PA 19381

Re: Koresko v. Farley et al; CCP No. 01-05343
Chester County, PA

Dear Ms. Mangold:

I am in receipt of Mr. Lamb's letter dated August 7. I will review the cases when received although Mr. Koresko has already reviewed the cases and indicated that the cases are distinguishable.

As we discussed in our phone conversation, you should review the Pennsylvania Supreme Courts decision in Frye v. City of Monongahela. 526 Pa. 170, 584 A.2d 946 (1991). In encompassed in a building permit issued to the landowners and which were not permitted by the applicable zoning ordinances. Thereafter, an adjacent landowners and which were not permitted by the applicable zoning ordinances. Thereafter, an adjacent landowner filed a complaint in equity to enforce the ordinance and to compel neighboring landowners to remove pigeon loft on grounds it was outside building permit. Relying on Section 617 of the MPC, the Court determined that the adjacent landowner, "as an aggrieved neighbor, had an independent right to seek relief from a zoning violation next door and that right could be asserted in an equity action. "Id. at 175, 584 A.2d at 948. Fur

ther, the Frye Court held that when, "deliberate violations of a zoning ordinance have the effect of wrongfully infringing on the property rights of a neighbor, that neighbor is entitled to prompt vindication in a court of equity without regard to alternate administrative remedies that might be available. We have that availability of administrative remedy does not deprive court of power to entertain claims challenging agency's failure to afford required remedy; availability of administrative remedy bears only on appropriateness of granting relief requested. The City of Monongahela, the governmental entity refusing to enforce the ordinances, was named a defendant.

In another recent case Peden v. Gambone Bros. Development Co., 798 A.2d 305 (Pa. Cmwlth. 2002), homeowners sought preliminary injunction preventing developer from constructing eight-foot fence in place of the vegetative screen which was required by local zoning ordinances. Mr. Peden was also concerned about damage his property and to trees on his property. The Borough, that did not properly enforce the ordinances, was named a defendant. The Court noted Section 617 of the MPC, entitled, "causes of action," provides:

In case any building, structure, landscaping or land is, or is proposed to be, erected, constructed, reconstructed, altered, converted, maintained or used in violation of any ordinance enacted under this act or prior enabling laws...any aggrieved owner or tenant of real property who shows that his property or person will be substantially affected by the alleged violation... may institute any appropriate action or proceeding to prevent, restrain, correct or abate such building, structure,

landscaping or land, or to prevent, in or about such premises, any act, conduct, business, or use constituting a violation...

Based upon this authority the Court held that Plaintiff Peden properly brought this action to enforce the relevant ordnances. Other commonwealth cases have similar holdings.

In the present case, the Koreskos filed a complaint in equity. The claims included the improper installation of propane tanks, without permit and in violation of ordinances. The Koreskos also alleged that the subdivision was defective and in violation of ordinances. The Koreskos also attempted to enforce the notations on subdivision plan as the subdivision pain detailed that certain trees should not be removed. The Defendants Farley and SRLP blatantly ignored the subdivision plan in: "Farley, SRLP, and his agents intentionally removed several mature trees from the 1185 Property, in contradiction to the express provisions of the Subdivision whereby such trees were shown to be retained."(Am Comp. 86).

Although notified of the Koreskos' claims months prior to the filing of the equity action, the Township refused to take any action to enforce the ordinances. Over a year after filing of the equity action, the Township finally enforced an ordinance and declared the propane tanks to be improperly installed without permit in the setback. On Monday August 5, 2002, I received formal notification that the tanks had been removed on reinstalled. Immediately the Township declared the lawsuit and enforcement of the Dragonetti statute. As discussed above, this suit is on par with the Frye case. The case is not frivolous. If not for this lawsuit, the

Township would not have enforced the ordinance regarding the propane tanks.

Furthermore, all relevant information has not been disclosed. When Township's Counsel was asked all documents were provided within the Township's control, you did not answer in the affirmative. In break between the depositions, I overheard you discussing with Mr. Yaw what documents needed to be disclosed. To ensure that the Township is providing all documents, a detailed document request was sent to you. Furthermore notices for depositions were sent to ensure full disclosure.

If you have any questions, please contact me.

Sincerely,

Virginia I. Miller

John J. Koresko, V, Esquire

Name :	MARK FARLEY
Organization:	FARLEY DEVELOPMENT CO.
Fax:	610-520-9501
Phone:	610-586-8800
From:	MICHAEL V. PILOTTI
Date:	07/05/02
Subject:	1175 & 1185 SEATON ROSS RD., PERMIT APPLICATION
Pages:	1

I'M CORRESPONDING TO YOU WITH THE RESULTS OF MY REVIEW OF YOUR APPLICATIONS SUBMITTED FOR UNDERGROUND TANK PLACEMENT FOR THE ABOVE REFERENCED PROPERTIES.

THE APPLICATION AS SUBMITTED ARE DENIED DUE TO SAID PLACEMENT WILL BE IN CONFLICT WITH TOWNSHIP ZONING REGULATIONS

IT IS MY UNDERSTANDING THAT PROPANE TALKS HAVE BEEN INSTALL UNDERGROUND AT THE SAID PROPERTIES WITHOUT OBTAINING A REVIEW AND OR THE REQUIRED PERMITS TO DO SO. THEREFORE I HAVE NO CHOICE, GIVEN THE CIRCUMSTANCES THAN TO ORDER THE REMOVAL OF THE ILLEGAL TANKS IMMEDIATELY, SUBMIT A REVISED PLOT PLAN SUGGESTING A LOCATION THAT WILL COMPLY WITH SAID ZONING REGULATIONS ALONG WITH THE REQUIRED INSPECTION REQUEST FORM.

I STRONGLY RECOMMEND THAT THIS WORK BE DONE WITHOUT DELAY SO TO AVOID ANY FINES THAT COULD BE ISSUED UNDER THE TOWNSHIP CODE AND THE BUILDING CODE TO ALL PARTIES INVOLVED.

PLEASE CONTACT MY OFFICE ALONG WITH YOUR SUBCONTRACTOR SO THAT WE CAN ALL BE ON THE SAME PAGE TOWARD RESOLVE AND AVOID SUCH ACTION. THANK YOU IN ADVANCE FOR YOUR PATIENCE AND COOPERATION WHILE UNDER ADVISEMENT IN THIS MATTER. I MAY BE REACHED AT 610-408-3612 DIRECTLY.

MICHAEL V. PILOTTI
BUILDING INSPECTOR
TREDYFFRIN TOWNSHIP

CC: Jack B. Tull Joseph A. Janasik

August 7, 2002

John J. Koresko, V, Esquire
Koresko & Associates
P.O. Box 60157
King of Prussia, PA 19406

Virginia I. Miller, Esquire
Anderson, Kill & Olick, P.C.
1600 Market Street, 32nd Fl
Philadelphia, PA 19103

Re: Koresko v. Mark Farley et al., CCCP No. 01-53433

Dear Mr. Koresko and Ms. Miller:

Enclosed please find Tredryffrin Township's Answer to Plaintiffs' Amended Complaint, which was filed today.

Also enclosed you will find several cases, which the Township believes, support its position that the Plaintiffs have absolutely no claim against the Township. At best, the Plaintiffs have a simple trespass claim against Seaton Ross L.P. Dragging the Township into this matter and forcing it to expend money to defend the frivolous claims against the Township is an abuse of process. I now understand that you seek to take the depositions of two Township officials. I urge you to read the enclosed cases and to reconsider proceeding with this lawsuit against the Township.

As far as the propane tanks are concerned, I am still at a loss as to the Plaintiffs' standing to complain about the propriety or impropriety of propane tanks on a neighboring property. In any event, the Township took action to have any problems remedied. Accordingly, any claims that the Plaintiffs thought they had with regard to the propane tanks are now moot.

Should the Plaintiffs choose to proceed with this lawsuit against the Township, you are hereby notified that any and all remedies that the Township has against the Plaintiffs for engaging in a frivolous lawsuit and abuse of process, including those set forth under the Dragonetti statute, will be explored.

I look forward to hearing from you by next Wednesday, August 14, 2002. Otherwise, I will infer that you have rejected my request and the Township will proceed accordingly.

Very truly yours,

William H. Lamb

Enclosures
WHL/aes
Cc: Scott E. Yaw, Esquire (w/encl)
Wayne W. Congar, Esquire (w/encl)
Vincent M. Pompo, Esquire
Susan C. Mangold, Esquire

John J. Koresko, V

KORESKO & ASSOCIATES
A PROFESSIONAL CORPORATION

Attorneys

200 West Fourth Street
Bridgeport, Pennsylvania 19405
(610) 992-2200
Fax (610) 992-1091

John J. Koresko V
Jeanne D. Bonney

Certified Public Accountant
Also Admitted in Florida
Also Admitted in New Jersey

August 8, 2002

William H. Lamb, Esquire
24 East Market St.
Box 565
West Chester, PA 19381

Re: Koresko v. Farley, CCCCP No. 01-53433

Dear Bill:

I received your letter of August 7. Let me say that I do not appreciate the threats.

In addition, your cases are distinguishable from the present matter. We have a 1991 Supreme Court decision and

a more recent Superior Court decision that enables an individual neighbor to pursue equitable and tort remedies beyond and despite the MPC. This case has nothing to do with the MPC as it is not an appeal of a zoning decision. The action implicates the Township as a willing, perhaps negligent, actor in a scheme that resulted in the de facto taking of easement rights. In any event, no subdivision plan is legal if it infringes rights of a neighboring property owner and that owner and that owner did not get notice of either the application for subdivision or the infringement on those rights.

As for the Township, we believe the complaint states a cause of action under 42 USC sec. 1983 and other applicable law. The action implicates the Township as a willing, perhaps negligent, actor in a scheme that resulted in the de facto taking of easement rights. We believe that the defendants acted under color of state law and that the Township permitted them to wrongfully trespass and create a nuisance. The righteousness of the Complaint is demonstrated by the removal of the propane tanks, which the Township called "illegal" in a recent correspondence. Unfortunately, Ms. Mangold did not give us the courtesy of informing us of the actions the Township was taking, despite the fact they were at the heart of litigation and the subject of a continuing discovery request.

Moreover, your office was put on notice of the removal of trees in violation of the notes on the subdivision plan. Despite notice, the Township did noting. It is clear that neighbors have a right to enforce the covenant that arise when a Township imposes conditions by way of notes on a subdivision plan. Those become private and public rights.

You will recall that a year ago we had a conference call to discuss your representation of the Township in this matter. I said I would consent so long as it was not adverse to my interests. On June 21, 2001, your firm agreed to represent me against Mark Farley. You assured me that the Township would stay "passive" and would accept the direction of Judge Shekin with respect to violations and/or reversal of the subdivision plan. Now, that has changed.

Your threatened Dragonetti action is clearly against my interests. Frankly, I am shocked you said such a thing to me. Therefore, in accordance with the Rules of Professional Conduct, it is probably best to ask you to resign from representing the Township in this matter.

This decision is not made lightly. Ms. Mangold of your office has been consistently involved in secret activities with defendant's counsel, Scott Yaw. In fact, Ms. Miller disclosed to me that she overheard Ms. Mangold and Mr. Yaw discussing "whether they should turn over certain documents." This clearly showed your firm's conflict and failure of Ms. Mangold to understand her constraints, which were explained to her at the last meeting we had at your office. I am surprised that you would permit an associate to blantanly violate the Rules relating to discovery and to conspire against the interests of a client of your firm. I assure you, this matter might not have escalated against the Township were it not for Ms.. Mangold's actions and the alliance she had made with the other defendants. Instead of staying somewhat neutral among the parties, as you assured a year ago, she chose the wrong side. Deposition notices went out because wee cannot trust that Ms. Mangold has been forthcom

ing with facts and information. We need facts, not further obfuscation and cute lawyer tactics.

I tried to call you about this but you were out. There are better ways to handle friends than to allow your associates to betray them. I think you probably make enough money from Township matters so that resignation from this case will not be a terrible blow to your firm. I do not want this matter to escalate into a further dissipation of our personal relationship, but I assure you I am hurt personally by your threats. I am sure you can communicate to Township officials how the Rules work.

By the way, I will be happy to handle a Dragonetti threat from any successor firm. We feel well founded in our position by virtue of the Supreme Court's unequivocal support of the rights of citizens to protect their property.

Please call me about this matter as soon as possible. If there is a way to dispose of the problem in a less drastic manner, I will listen to you. Otherwise, we should all do what is best.

Thank you for your kind consideration.

Very truly yours,

John J. Koresko, V

JJK/

Cc: Virginia Miller, Esquire

August 12, 2002

Via Facsimile, V, Esquire
Koresko & Associates
P.O. Box 60157

King of Prussia, PA 19406

Re: Koresko v. Mark Farley et al., CCNP No. 01-53433

Dear Mr. Koresko:

I am in receipt of your letter dated August 8, 2002.

Your recollection of our conversation in June of 2001 is directly opposite my recollection. It is my distinct recollection that Advised you that Tredyffrin Township was a long term client of mine and that if any conflict arose between our representation of the Township in the above referenced matter and our acting as local counsel for you in the matter of Koresko & Associates, P.C. v. Mark Farley, we would no longer be able to represent you. You will also recall that you assured me that the Township would remain a passive defendant. Vince Pompo was represent for this conversation and his recollection comports with mine.

Accordingly, this firm will not be resigning from representing the Township in the above referenced matter. Rather, you are hereby notified that Joel Frank is in the process of

withdrawing as co-counsel in the matter of Koresko & Associates, P.C. v. Mark Farley.

You should also be aware that my view of the validity of your claims against the Township remains the same, as do my intentions wt forth in my August 7, 2002 letter to

you should you choose to proceed with this lawsuit against the Township.

Very truly yours,

William H. Lamb

WHL/aes
Cc: Virginia Miller, Esquire (via facsimile)
Vincent M. Pompo, Esquire
Susan C. Mangold, Esquire

KORESKO & ASSOCIATES
A PROFESSIONAL CORPORATION

Attorneys

200 West Fourth Street
Bridgeport, Pennsylvania 19405
(610) 992-2200
Fax (610) 992-1091

John J. Koresko V
Jeanne D. Bonney

Certified Public Accountant
Also Admitted in Florida
Also Admitted in New Jersey

August 12, 2002

William H. Lamb, Esquire
24 East Market St.
Box 565
West Chester, PA 19381

Re: Koresko v. Farley, CCCCP No. 01-53433

Dear Bill:

I received your letter dated today.

The conversation we had about conflicts occurred last year when Ms. Miller sat with you and you both telephoned me when I was in Chicago. Her recollection comports with

mine. If you want to get Vince Pompo involved, that's fine. It really does not matter. I was the one who raised the conflict issue, not you. I consented to the conflict as long as you did not act against my best interests. The Rules of Professional Conduct do not give you the choice of whom you can represent, and you never sent any written Limitation of your duties to protect my best interests.

You assured me that no more permits would issue regarding the subject properties. They did, and we did not even get notice until months later. Imagine why we are a little disturbed.

Since you have refused to give me the courtesy of a telephone call, I will assume that you have no desire to handle this like gentlemen. Be advised that Ms. Mangold is the source of contentiousness in the matter, and we do not feel she is a person who can be a catalyst for settlement of claims against the Township. Of course, if it is your intention not to engage in settlement discussion, then I understand her continued involvement.

In her "research, " Ms. Mangold missed the graveamen of the Complaint against the Township. Section 1983 of Title 42, U.S.C. gives rights of action far beyond those she myopically focused upon. The allegation is that Bower and Farley acted under color of state law, otherwise they would not have been permitted to build the driveway that damaged my property. If you recall Jordan v. Fox Rothchild you will note that the confession of judgment procedure was arguably legal, although it still created a constitutional violation. Simi

larly, in this context, whether or not the subdivision process was "legal" based on the ordinance, the application of the
ordinance had the effect of depriving me of property without due process of law and without compensation. Those are not MPC claims. The ordinance is unconstitutional because it does not protect the rights of adjoining property owners and leads exactly to the problem illustrated in this case. As I recall, the MPC does not trump the Constitution of the United States.

I think it is further remarkable that the township had refused to fine Mr. Farley or his entitles, despite clear and convincing evidence be violated the terms of the subdivision plan. Ms. Mangold's friendly affiliation with Mr. Yaw during the course of the litigation indicates to use the complicity of Tredyffrin Township in Mr. Farley's torts. Your refusal to act on behalf of citizens who have been harmed and your refusal to penalize Mr. Farley cannot bode well for your allegation that you are just a by-stander.

I fear no Dragonetti claim as the claim is well founded. The illegally installed propane tanks were only moved after I filed suit to compel the Township to move them. However, I have given nothing regarding the driveway and the trees that were cut-down in violation of the approved subdivision plan. These continuing claims implicate the Township as willing actor in a continuing nuisance and trespass against my property.

I am most disappointed in the manner you have dismissed my attempt to engage you in constructive conversation. You didn't return my call and sent me a "nastygram."

So be it. You leave me with few options to protect my interests.

Thank you for your kind consideration.

Very truly yours,

JJK/ John J. Koresko, V

Cc: Virginia Miller, Esquire (fax 215-568-4712)

August 12, 2002

John Koresko, Esquire
Koresko & Associates, P.C.
500 Gulp Road
Suite 110
King of Prussia, PA 19406

Re: Koresko & Associates v. Mark Farley

Dear Mr. Koresko:

I have been informed that a dispute has arisen between you and my firm to the extent that it is no longer advisable for me to serve as local counsel for you in this matter. Consequently, I have enclosed a copy of my Withdrawal of Appearance, the original of which has been filed with the Court.

Sincerely,

Joel L. Frank

JKF/cd

Cc: Virginia Miller, Esquire
William H. Lamb, Esquire

Via Facsimile
John J. Koresko, V, Esquire
P.O. Box 60157
King of Prussia, PA 19406

Re: Koresko v. Mark Farley et al, CCCCP No. 01-53433

Dear John:

I received your letter dated August 12, 2002 and I do not intend to debate all of the issues with you. As far as the legal issues, Judge Shenkin will decide those. However, I find it incredible and highly unprofessional that you would attack a lawyer in my office when she is simply doing her job. Parties can disagree without becoming disagreeable and I think it is a mistake to lower this litigation to that level.

You will have to do what you will have to do. I believe I am exercising my professional responsibility in withdrawing this firm's appearance as local counsel on your behalf. Just ask yourself, John, why would I—in a very small matter for you sacrifice a client of thirty years?

Very truly yours,

William H. Lamb

WHL/aes
Cc: Virginia Miller, Esquire (via facsimile)
Vincent M. Pompo, Esquire
Susan C. Mangold, Esquire

KORESKO & ASSOCIATES
BY: JOHN J. KORESKO, V, ESQUIRE
ATTY. I. D. #42795
500 N. GULPH RD., SUITE 110
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(610) 992-2200

ANDERSON KILL & OLICK, P. C.
BY: VIRGINIA I. MILLER, ESQUIRE
ATTY I.D. #85361
1600 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 568-4202
Attorneys for Plaintiffs

IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA

John J. Koresko, V., et al.

Plaintiffs,

V NO. 01-05343

Mark Farley, et al.

Defendants.

AFFIDAVIT OF JOHN J. KORESKO, V ~~IN SUP~~PORT OF MOTION TO DISQUALIFY LAMB, WINDLE & McERLANE, P.C. COUNSEL FOR DEFENDANT TOWNSHIP OF TREDYFFRIN

COMMONWEALTH OF PENNSYLVANIA

COUNTY OF MONTGOMERY

John J. Koresko, V, Esquire, being duly sworn according to law, deposes and states the following:

I am the sole shareholder of Koresko & Associates, P.C. ("Koresko"), in which firm I practice law. I was admitted to the Florida Bar in 1984 and the Pennsylvania Bar in 1985.

On July 17, 2000, I initiated an action in the Court of Common Pleas, Chester County, Pennsylvania, against Mark Farley captioned, Koresko & Associates, P.C. v. Mark Farley (hereinafter the "Collection Action"), and asserted causes of action relating to the indexing of a judgment against Mark

Farley at a property he owned at 1175 to 1185 Seaton Ross Road, Radnor, Tredyffrin Township, Chester County, Pennsylvania (hereinafter the "1185 Property").

In June 2001, I retained the LWM Firm to serve as co-counsel for Koresko in the Collection Action.

On June 21, 2001, the LWM Firm entered its appearance on behalf of Koresko, and appeared at a hearing in the Collection Action on behalf of Koresko.

As part of the LWM Firm's representation of Koresko in the Collection Action, attorneys at the LWM Firm were privy to attorney/client communications and other information relating to the 1185 Property and the Collection Action. For example, in telephone conference and at a meeting held in the offices of LWM, I disclosed elements of our trial strategy to William Lamb. Also, at a Republican fundraising event for Attorney General Fisher held at the Desmond Hotel several months ago, I discussed my views on the Collection Action and the Seaton Ross Action with Joel Frank, Esquire of the LWM Firm. I would not have shared certain views and information with Lamb or Frank had I known my relationship with LWM was that of adversary.

From my discussions with Mr. Frank, it was clear the LWM Firm understood the importance and scope of its representation, because my co-counsel in the Collection Action, Virginia Miller, Esquire, is a Major in a Special Operations Combat C130 Air National Guard unit that is subject to immediate deployment at any time. If attorney Miller was called to active duty, I believe it was understood that the LWM Firm would serve as primary counsel in the Collection Action. This back-up became essential after the events of

September 11, 2001. Since September 11, 2001, attorney Miller deployed twice to an oversea combat zone and spent over 100 days on active duty. The Collection Action is still pending.

On June 25, 2001, I initiated the present action against several Defendants, including Mark Farley and the Township of Tredyffrin, alleging causes of action arising from development at the 1185 Property, including Trespass, unlawful removal of trees, violation of various ordiances, unlawful subdivision plan, improper installation of unlawful propane tanks, and the failure to observe setback requirements (hereinafter the Seaton Ross Action").

The Seaton Ross Action names the Township of Tredyffrin (herein the "Township") as a Defendant as a result of its actions and inaction relating to the 1185 Property. The Township failed to inform us of any pending subdivision plan regarding the 1185 Property, and by permitting the development as shown on the plan, enabled Farley and the other defendants to destory the root systems of border tress. We alleged that this action or inaction by the Township constituted an unlawful taking of a property interest and that the ordinances was unconstitutional since it provided no procedural or substantive safeguards to adjoining landowners. We alleged that these deficiencies constituted violations of rights guaranteed under the Pennsylvania and U.S. Constitutions, and that Farley was a resulting "state actor" under 42 U.S.C. sec. 1983.

In formulating the Seaton Ross Action, Attorney Miller and I relied on case law throughtout the United States, and an A.L.R. article relating to tree branch and root easements, and a statement by the Pennsylvania Superior Court that a cause of action probably existed for prescriptive easement due to

unimpeded encroachment of tree branches. At all times, we believed that Township was a necessary and indispensable party.

I was aware that the LWM Firm has been counsel for the Township in various matters and that Mr. Lamb serves as Solicitor.

Knowing that the Township would be Defendat in the Seaton Ross Action, and aware that the LWM Firm was privy to confidential information in the Collection Action, and sensitive to the probable conflict of interest that would attach to LWM, I sought a meeting with LWM Firm to discuss the allegation against the Township in the Seaton Ross Action, and the LWM Firm's possible representation of the Township in that action.

Around that time, I sent a letter to William H. Lamb, Esquire, in which I told him that I did not want him to feel "whip-sawed" because his firm had already begun to represent my interests in another matter. It was never my intention to be unfair with him and I thought the matters could be worked-out.

.

On or around June 25, 2001, a meeting took place at the offices of the LWM Firm, and Counsel for Koresko, Virginia Miller, Esquire. I participated via telephone from Chicago, III.

At the June 25, 2001 meeting, attorney Miller and I were advised by the LWM Firm that the LWM Firm would be repre-

senting the Township in the Seaton Ross Action. I raised the issue of the potential conflict of interest in the LWM Firms representation of an adverse party(the Township) while representing Koresko in the Collection Action. I sought, and received assurances from the LWM Firm that the Township would take only a passive role in the disputes which are the subject of the Seaton Ross Action, would take no action against the interests of Koresko in the Seaton Ross Action, and that the Township would not issue any new permits relating to the 1185 Property.

At the June 25, 2001 meeting, I agreed that I would waive the conflict in the LWM Firm's representation of Koresko in the Collection Action, and the Township in the Seaton Ross Action, as long as no actions were taken by the LWM Firm and the Township in the Seaton Ross Action that would be adverse to the interests of Koresko or myself.

In August, 2002, however, it became apparent that the Township, and more egregiously, the LWM Firm, were taking actions directly against the interest of Koresko and me, contrary to the agreements reached on June 25, 2001, including:

At a deposition on August 5, 2002, the Township revealed that in May 2002, Farley requested permits for the 1185 Property, various correspondence ensured, and that the

Township had issued permits relating to the removal/relocation of the propane tanks, and the tanks had been relocated. Despite the fact that this issue is central to the dispute in the Seaton Firm, and failed to disclosure this information to Plaintiffs.

That contrary to the agreement reached on June 25, 2001, that the LWM Firm and the Township would take no action in the Seaton Ross Action adverse to the interests of Koresko and me, it became apparent that the LWM Firm was, in coordination with counsel for other Defendant, determining whether clearly relevant documents should be produced to Koresko.

On August 7, 2002, William H. Lamb, Esquire, of the LWM Firm forwarded a letter to Koresko enclosing the Township's Answer to the Amended Complaint, and advising that attorney Lamb believed the Amended Complaint as it relates to the Township was a frivolous lawsuit, and attorney Lamb threatened a Dragonetti action. (See letter of Aug. 7, 2002, Miller Aff., Ex. "5").

In response to the August 7, 2002 letter, I wrote to the LWM Firm taking exception to attorney Lamb's characterizations of the causes of action in the Seaton Ross Action, setting forth the legal basis for the claims against the Township, and advising that the actions of the LWM Firm were in conflict with the agreement reached on June 25, 2001. Because the LWM Firm was representing the Township in an action that was now directly adverse to the interests of Koresko and me, and while continuing to represent Koresko in the Collection Action, I asked the LWM Firm to withdraw as counsel for the township in the Seaton Ross Action. (See Letter of Aug. 8, 2002, Miller Aff., Ex. "6").

In response to my August 7, 2002 letter, the LWM Firm advised that its recollection of the agreements reached on

June 25, 2001 differed from Koresko's that it would not resign as counsel for the Township in the Seaton Ross Action.

Apparently recognizing the conflict of interest, LWM advised me that it was going to withdraw as counsel for Koresko in the Collection Action. (See letter of Aug. 12, 2002, Miller Aff.,"7").

On August 12, 2002, I wrote to the LWM Firm and took issue with its attempt to resolve the conflict by withdrawing from the Collection Action. (See letter of Aug. 12, 2002, Miller Aff, Ex "8").

On August 12, 2002, the LWM Firm wrote to me, enclosing its Withdrawal of Appearances as counsel for Koresko in the Collection Action, and advising that the Withdraw was necessitated because a "dispute has arisen" between Koresko and LWM Firm. (See letter of Aug. 12, 2002, Miller Aff., Ex "9").

On August 14, 2002, in response to my August 12, 2002 letter, the LWM Firm stated that its decision to drop Koresko as opposed to the Township was motivated by its long relationship with the Township verses representing Koresko in a "very small matter". (See letter of Aug. 14, 2002, Miller Aff., Ex. 10).

At no time did I ever waive any conflict of LWM. I gave a conditional waiver only so long as LWM did not take actions detrimental to my interests.

Any action against me is necessarily adverse to Koresko because Koresko depends on me for all of its financial capital and cannot earn revenue without my services. Any adverse legal action would harm my ability to finance the Koresko enterprise. In addition, the claims that Koresko has inure directly to my benefit as sole shareholder.

FURTHER AFFIANT SAYETH NAUGHT.

_____

JOHN J. KORESKO, V

SWORN AND SUBSCRIBED
BEFORE ME THIS 24TH DAY OF
SEPTEMBER 2002.

_____

NOTARY PUBLIC

MY COMMISSION EXPIRES

CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of the Affidavit of John J. Koresko, V. on the following parties by U.S. Mail First Class on the date started:

Scott E. Yaw, Esquire
Robert W. Lentz, Esquire
Lentz, Cantor, & Massey, Ltd.
Chester County Commons
20 Mystic Lane
Malvern, PA 19355
Attorney for Defendants Mark Farley and Seaton Ross, L.P.

Henry Portner Esquire
Henry Portner & Associates
P.O. Box 200
125 E. Lancaster Avenue
Paoli, PA 19301
Attorney for Defendant Ollie Bower

Susan C. Mangold Esquire
Vincent M. Pompo, Esquire
Lamb, Windle & McErlane, PC
24 East Market Street
P.O. Box 565
West Chester, PA 19381
Attorneys for Township of Tredyffrin

JEANNE D. BONNEY, ESQUIRE
Koresko & Associates, PC

Attorney for Plaintiffs

Dated: September 26, 2002

APPENDIX J – PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM

IN THE COURT OF COMMON PLEAS CHESTER COUNTY, PENNSYLVANIA CIVIL ACTION-EQUITY

John J. Koresko, V., et al
Plaintiffs

v.

Mark Farley, et al
Defendants

No. 01-05343

TO THE PROTHONOTARY:

Kindly submit the following matter to the Honorable Judge Shenkin for determination:

Plaintiffs' Motion for Partial Summary Judgment filed November 14, 2002.

Oral Argument Requested.

VIRGINIA I. MILLER, ESQUIRE
ANDERSON KILL & OLICK, P.C.
1600 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 568-4202

Dated: November 14, 2002

KORESKO & ASSOCIATES, P.C.
BY: John J. Koresko, V., Esquire
ATTY. I.D.#42795
200 W. Fourth St.
Bridgeport, PA 19405
(610) 992-2200

ANDRESON KILL & OLICK, P.C.
BY: VIRGINIA I. MILLER, ESQUIRE
ATTY I.D.#85361
1600 Market Street, 25th Floor
Philadelphia, PA 19103
(215) 568-4202

IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA CIVIL ACTION-LAW

John J. Koresko, V., et al
Plaintiffs

v.

Mark Farley, et al.
Defendants

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs (collectively, the "Koresko" or Plaintiffs"), pursuant to the Pennsylvania Rules of Civil Procedure and by and through their attorneys, file this Motion for Partial Summary Judgment.

1. The Koreskos own a property located at 1159 Seaton Ross Road, Radnor, Pennsyl

2. vania (The Koreskos' Property), and located adjacent to 1175-1185 Seaton Ross Road, Radnor, Pennsylvania (the "1185 Property") (Am. Compl., ¶2).

3. Prior to approximately March 2001, defen dant Ollie Bower ("Bower") owned the 1185 Property. (Am. Compl., ¶28).

4. Along the boundary between the tow properties were many mature trees, all more than 21 years old. (Am. Compl., ¶20-21).

5. The boundary trees were on the Koreskos' Property, but their roots and branches grew over onto the 1185 Property. (Am. Compl., ¶65).

6. On or about late 1999, defendant Bower agreed to sell the 1185 Property to defendant Mark Farley and or an entity controlled by defendant Farley (collectively "Farley Defendants"). (Am. Compl., ¶10).

7. The Farley Defendants, acting as an agent for Bower, filed a subdivision plan for the 1185 Property (hereinafter the "Subdivision Plan"). (Am. Compl., ¶13).

8. The Subdivision Plan failed to list certain easements and other affected property rights of the adjoining landowners. (Am. Comp., ¶22).

9. The Subdivision Plan was improperly approved without notice to the Koreskos. (Am. Compl., ¶14).

10. On June 4, 2000; upon constructive notice of the Subdivision Plan and less than 10 days after issuance of building permits, the KOreskos protested the subdivision and building permits. (Am. Compl., Ex. "A").

11. The Farley Defendants dug trenches and continued improvements that caused extensive damage to the Koreskos' boundary trees and interfered with the Koreskos' property rights. (Am. COmpl., ¶ ¶ 26, 42, 44).

12. Defendants also trespassed onto the Koreskos' property and damaged the Koreskos' property and trees. (Am. Compl. ¶56).

13. The Farley Defendants wrongfully removed at least two trees from the Koreskos' Property (Am. Compl., ¶44).

14. The Farley Defendants unlawfully installed propane tanks on the 1185 Property in the setback and without permits. (Am. Compl., ¶¶34-41).

15. The Farley Defendants wrongfully removed several trees from the 1185 Property, counter

16. to the express provisions of the Subdivision. (Am. Compl., ¶¶43-44).

17. On June 25, 2001, the Koreskos file d their Complaint against the Farley Defendants and other defendants requesting 1) injunctive relief as to enjoin any further construction or improvements that interfere with the Koreskos' property rights, 2) restitution regarding damage to the Koreskos' property, 3) that defendants be ordered to file an new subdivision plan as the prior plan intentionally or negligently withheld material information that affected the Koreskos' right to due process and resulted in taking the property without hearing, 4)that defendants be ordered to repair the Koreskos' property and to restore the Koreskos' property to the original condition, 5) that defendants be ordered to pay attorneys' fees and costs, and 6) that this Court order any other relief as necessary and appropriate. (Am. Compl.).

18. In late June 2001, Robert W. Grupp and Jan M. Grupp and Stephen Kaye and Diane Kaye (Collectively, the "Kaye and Grupp Defendants") purchased the 1185 Property. (Am. Compl., ¶53-54). Prior to their purchase, these parties were notified of the disputes and the present lawsuit involving the 1185 Property. (Am.Compl., ¶¶49-54).

19. On or about December 18, 2001, Defendants filed a Motion to Join Additional Defendants. On February 13, 2002, this court granted Plaintiffs' Motion to Join Additional Defendants. On March 6, 2002, Plaintiffs filed an Amended Complaint.

20. The Pennsylvania Rules of Civil Procedure permit either party to "move for summary judgment in whole or in part as a matter of law...whenever there are no genuine issue of material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report." Pa. R. Civ. P. 1035.2."

21. A grant of summary judgment is proper where the pleadings, depositions, answers to interrogatories, admissions of record and affidavits on file support the lower court's conclusion that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *"Nationwide Mut. Ins. Co. v. Nixon,* 453 Pa. Super. 70, 75-76, 682 A.2d 1310, 1313 (Citations omitted; emphasis added), alloc., denied, 548 Pa. 619, 693 A.2d 589 (1996)

COUNT I

Plaintiffs Are Entitled To Partial Summary Judgment That Tree Branches And Roots From Trees Located On The Koreskos' Property Created An Easement On The 1185 Property.

22. Courts in Pennsylvania and elsewhere have recognized that it is possible to have a prescriptive easement based upon trees if all elements are present.

23. Accordingly, as a matter of law, plaintiffs can, if all requite elements are present, establish an easement based upon trees from an adjoining property.

COUNT II

Plaintiffs Are Entitled to Summary Judgment That The Defendants Trespassed On Their Property And Removed Trees Located on Plaintiffs Property.

24. Plaintiffs allege in the Amended Complaint that defendants trespassed on their property, and cut down trees thereon without the consent of Plaintiffs. (Am. Compl. , ¶¶ 82-24).

25. Attached hereto as Exhibit 1 is the report by arboricultural consultant Andrew William Graham, Jr., confirming that at least one tree on the Koreskos' property was cut down. (See Report on Tree Related Damages From Con

26. struction and Value of Loss, by Andrew William Graham, Jr., at 3-4).

27. As such, with regard to the Plaintiffs' trespass cause of action, this Court should find that a trespass has occurred, and thus leave for trial the issue of who among the defendants is liable for the trespass, as well as the question of damages.

Count III

The Defendants Unlawfully Installed Propane Tanks In The Setback Area Of The 1185 Property, And Even Though The Tanks Were Subsequently Removed And Reinstalled Elsewhere Pursuant TO A Valid Permit, Plaintiffs Are Entitled To Damages For Harm Caused To Their Trees, And Are Entitled To Attorney's Fees As A Result Of Having To Bring This Action To Force The Removal Of The Tanks

28. In the Amended Complaint, Plaintiffs assert that underground propane tanks were unlawfully installed at the 1185 Property. (Am.Compl., ¶ ¶ 34-40).

29. The Unlawful installation of the propane tanks was confirmed during the deposition of Michael V. Pilotti, Building Inspector for the Tredyffrin Township. (See Pilotti Dep. at 15, attached hereto as Ex. "2").

30. In a letter dated July 5, 2002 from Mr. Pilotti to defendant Mark Farley, Mr. Pilotti writes, "[i]t is my understanding that propane tanks have been installed underground at the said properties [the 1185 Property] without obtaining a view and or the required permits to do so. Therefore I have no choice, given the circumstances than to order the removal of the illegal tanks immediately..." (See Exhibit 2 to Pilotti deposition, attached hereto as Ex. "3".)

31. As such, the factual question as to whether the tanks were unlawfully installed is no longer at issue, and this Court should so rule.

32. In addition, while tanks were removed, the removal of the tanks was only part to the relief requested by Plaintiffs. There remain a factual question as to the damages suffered b Plaintiffs as a result of the unlawful installation of the tanks.

33. As evident by the date of Mr. Pilotti's letter to defendant Farley, the actions by Tredyffrin Township in forcing the defendants to comply with applicable codes and remove the "illegal tanks", came only after the initiation of this action. As a result, Plaintiffs are entitled to their attorney's fees associated with this issue.

34. Since there are no factual issues in dispute that the tanks were unlawfully installed, Plaintiffs are entitled to the entry of judgment of this issue, with the questions of who among the defendants is liable, and damages, left for trial.

Count IV

Plaintiffs, As Adjacent Property Owners, Have A Right To Pursue An Action In Equity To Object To The Subdivision Plan For The 1185 Property To The Extent That It Infringes On Their Property Rights, And Alternatively Seek Court Intervention To Force Compliance With The Subdivision Plan.

34. Plaintiffs, the adjoining landowners, filed this action to object to the Subdivision Plan and alternatively to enforce the relevant ordinances as put forth in the subdivision Plan and notes on that Subdivision Plan.

35. Less than 10 days after issuance of the building permits, the Koreskos protested the subdivision and building permits. (Am.Compl., Ex. "A").

36. Tredyffrin Township ignored the Koreskos request for enforcement and failed to take action to enforce the relevant ordinances.

37. Plaintiffs, as adjoining landowners, claim that their property rights were violated as they did

38. not receive notice of the subdivsion and that the Subdivison Plan failed to list certain details, including boundary trees, that effected their property rights. Furthermore, Plaintiffs aver that the placement of propane tanks in the setback area was in violation of building permits and codes and should be removed.

39. Substantial rights of the Plaintiffs have been affected. When the Plaintiffs appealed to the Township an the Township did nothing, the Plaintiffs were well within their rights to take their grievances to a court of equity.

40. Defendants failed to comply with the Subdivision Plan, including certain notes to the Plan from the Chester County Planning Commission and removed certain trees that were to be retained pursuant to the Subdivision Plan (Am. Compl., ¶ ¶ 64, 77, 86, 88).

41. This Court has jurisdiction to make determinations relating to the lawfulness of the Subdivision Plan, as well as compliance with the Subdivision Plan.

42. Alternatively, this Court can use its equitable powers to enforce terms of the Subdivision Plan.

Conditions attached to an approved subdivision plan may be enforced by actions in equity.

43. Plaintiffs are entitled to judgment in their favor as this Court does have jurisdiction to hear objections to the Subdivision Plan, and alternatively, that this Court can enforce ordinances put forth in the Subdivision Plan, and notes on the Subdivision Plan, and leave for trial the questions of the validity of the Subdivision Plan, compliance with the Subdivision Plan, who among the defendants is liable if violations occurred, and the damages to which Plaintiffs may be entitled.

Wherefore, the Koreskos file their Motion for Partial Summary Judgment as to the following issues.

1. That tree branches and roots can create an easement.

2. That the defendants trespassed on Plaintiffs' property and removed trees located on Plaintiffs' property.

3. That the initial installation of underground propane tanks in the setback area on the property adjacent to the Plaintiffs' porperty was done without a permit, was unlawful, and infringed onPlaintiffs' property rights and that Plaintiffs have been damaged by said acts in an amount to be proven at trial.

4. That Plaintiffs, as an adjacent property owner, can pursue their action in equity to object to the Subdivision Plan to the extent that it infringes on their property interests, an alternatively can seek court intervention to force compliance with the Subdivision Plan and relevant ordinances.

Respectfully submitted,

_____
John J. Koresko, V, Esquire
Virginia I. Miller, Esquire
Attorneys for Plaintiff

DATED: November 14, 2002

IN THE COURT OF COMMON PLEAS CHESTER COUNTY, PENNSYLVANIA CIVIL ACTION-EQUITY

John J. Koresko, V., et al
Plaintiffs

v.

Mark Farley, et al
Defendants

No. 01-05343

TO THE PROTHONOTARY:

Kindly submit the following matter to the Honorable Judge Shenkin for determination:

Plaintiffs' Motion for Partial Summary Judgment filed November 14, 2002.

Oral Argument Requested.

VIRGINIA I. MILLER, ESQUIRE
ANDERSON KILL & OLICK, P.C.
1600 Market Street, Suite 2500
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(215) 568-4202

Dated: November 14, 2002

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IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA CIVIL ACTION-LAW

John J. Koresko, V., et al
Plaintiffs

v.

Mark Farley, et al.
Defendants

No. 01-05343

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs (collectively, the "Koreskos" of Plaintiffs"), pursuant to the Pennsylvania Rules of Civil Procedure and by and through their attorneys, file this Memorandum of Law in Support of their Motion for Partial Summary Judgment.

I. INTRODUCTION

The Koreskos file their Motion for Partial Summary Judgment as to the following issues;

1. that tree branches and roots can create an easement,

2. that the defendants trespassed on Plaintiffs' property and removed trees located on Plaintiffs' property.

3. that the initial installation of underground propane tanks in the setback area on the property adjacent to the Plaintiffs' property was done without a permit, was unlawful, and infringed on Plaintiffs' property rights. Despite the subsequent removal and reinstallation of the tanks outside of the setback area and pursuant to a properly issued permit, Plaintiffs' have suffered damages as a result to the illegal installation, including attorney's fees as a result of having to bring this action in order to force the removal and relocation of the tanks, and

4. that an adjacent property owner has a right to pursue an action in equity to object to a subdivision plan that infringes on the owner's property interests, and alternatively to seek court intervention to force compliance with a subdivision plan.

All of these legal issues can be resolved pursuant to a motion for summary judgment, leaving for trial disputed factual issues such as who among the defendants is ultimately liable for each of these acts, as well as the amount of the damages to which Plaintiffs are entitled.

II. BACKGROUD [1]

A. The Action

The Koreskos own a property located at 1159 Seaton Ross Road, Radnor, Pennsylvania (The "Koreskos' Property"), and located adjacent to 1175-1185 Seaton Ross Road, Radnor, Pennsylvania (the "1185 Property") (Am.Compl.,¶ 28). Along the boundary between the two properties were many mature trees, all more than 21 years old. (Am.Compl., ¶¶ 20-21). The boundary trees were on the Koreskos' Property; but their roots and branches grew over onto the 1185 Property. (Am.Compl., ¶65). On or about late 1999, defendant Bower agreed to sell the 1185 Property to defendant Mark Farley and or an entity controlled by defendant Farley (collectively "Farley Defendants"). (Am.Compl., ¶10).

The Farley Defendants, acting as agent for Bower, filed a subdivision plan for the 1185 Property (hereinafter the "Subdivision Plan"). (Am.Compl., ¶ 13). The Subdivision Plan failed to list certain easements and other affected property rights of the adjoining landowners. (Am.Compl., ¶22). The Subdivision Plan was improperly approved without notice to the Koresko. (Am.Compl., ¶14). On June 4, 2000; upon constructive notice of the Subdivision Plan and less than 10 days after issuance of building permits, the Koreskos protested the subdivision and building permits. (Am.Compl., Ex. "A").

The Farley Defendants dug trenches and continued improvements that caused extensive damage to the Koreskos' boundary trees and interfered with the Koreskos' property rights. (Am.Compl. ¶¶., 26, 42, 44). Defendants also

trespassed onto the Koreskos' property and damaged the Koreskos' property and trees. (Am. Compl. ¶56). The Farley Defendants wrongfully removed at least two trees from the Koreskos' Property. (Am. Compl. ¶44). The Farley Defendants unlawfully installed propane tanks on the 1185 Property in the setback and without permits. (Am.Compl., ¶¶ 34-41). The Farley Defendants wrongfully removed several trees from the 1185 Property counter to the express provisions of the Subdivision. (Am.Compl., ¶¶43-47)

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1 For a more detailed description of the damage and subsequent claims at issue here, the Koreskos respectfully direct the Court to the Amended Complaint

B. Relevant Procedural History

On June, 25, 2001, the Koreskos filed their Complaint against the Farley Defendants and other defendants requesting 1) injunctive relief as to enjoin any further construction or improvements that interfere with the Koreskos' property rights, 2) restitution regarding damage to the Koreskos' property, 3) that defendants be ordered to file an new subdivision plan as the prior plan intentionally or negligently withheld material information that affected the Koreskos' right to due process and resulted in a taking of property without hearing. 4) that defendants be ordered to repair the Koreskos' property and to restore the Koreskos' property to the original condition, 5) that defendants be ordered to pay attorneys fees and costs, and 6) that this court order any other relief as necessary and appropriate. (Am.Compl.).

In late June 2001, Robert W. Grupp and Jan M. Grupp and Stephen Kaye and Diana Kaye (collectively, the "Kaye and Grupp Defendants") purchased the 1185 Property. (Am. Comple., ¶¶ 53-54). Prior to their purchase , these parties were notified of the disputes and the present lawsuit involving the 1185 Property. (Am. Compl., ¶¶ 49-54). On or about December 18, 2001, Defendants filed a Motion to Join Additional Defendants. On February 13, 2002, this Court granted Plaintiffs' Motion to Jon Additional Defendants. On March 6, 2002, Plaintiffs filed an Amended Complaint.

All of the Defendants have filed motion for partial judgment on the pleadings (collectively herein "Defendants' Motions"). Defendants' Motions are all virtually identical, and assert that the defendants are entitled to judgment on all

counts of the Amended Complaint with the exception of Court III, which is for trespass.[2] Many of the issues raised in all the Defendants' Motions are also addressed in the present Motion.

III. THE LEGAL STANDARD

The Rules permit either part to "move for summary judgment in whole or in part as a matte of law....whenever there are no genuine issue of material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report." Pa.R.Civ. P.1035.2. " A grant of summary judgment is proper where the pleadings, depositions, answers to interrogatories, admission of record and affidavits on file support the lowe court's conclusion that no genuine issue of material facts exist and the moving party is entitled to judgment as a matter of law." *Nationwide Mut. Ins. Co., v. Nixon,* 453 Pa. Super. 70, 75-76, 682 A.2d 1310, 1313 (Citations omitted; emphasis added), *alloc. denied*, 548 Pa. 619, 693 A.2d 589 (1996).

IV.ARGUMENT

1. Plaintiffs Are Entitled To Partial Summary Judgment That Tree Branches And Roots From Trees Located On The Koreskos' Property Created An Easement On The 1185 Property.[3]

Courts in Pennsylvania have recognized that it is quite possible to have a prescriptive easement based upon trees if all are present. *Jones v. Wagner,* 425 Pa. Super. 102. (1993). In the Jones Court addressed the issue of tree branches creating an easement by adverse possession.

We cannot help but wonder whether the continued presence of encroaching tree branches, held openly, notoriously, hostilely, and continually for 21 years would create a prescriptive easement in the airspace which they hang. If this

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[2] In the Motion for Judgment on the Pleadings filed by the Group and Kaye defendants, they assert that the Amended Complaint does not assert a cause of action against theme for trespass, and if it does, they are entitled to judgment as a matter of law because "the alleged trespass was done by those who the Grupps did not employ and over whom the Grupps had no ability and/or right to control." (See Motion for Judgment on the Pleadings of Defendants Robert W. Grupp and Jan M. Grupp and Stephen D. Kaye and Diana S. Kaye, p.2 n.1). The question of who among the defendants, including the Grupp and Kaye defendants, directed and/or ordered the trespass upon Plaintiffs property is a dispute factual question, which must be left for trial.

would be the case, **and we can find no Pennsylvania law which would indicate that a prescriptive easement is not available in this situation,** a landowner who suffers actual harm for the first time during the tree owner's twenty-second year of hostile ownership, might very well be precluded from seeking a judicial, or even self-help, remedy.

Id. at p. 111. n.3, (Emphasis added).

Other courts have also recognized an easement for trees. No Pennsylvania Court or other court has held that the easement for tees, as stated in the Amended Complaint, are not possible. A Texas court recognized that the owner of a tree whose branches penetrated adjoining premises might obtain the right to the air space occupied by the encroachment, if he could establish the elements of an easement of an easement appurtenant, whether implied of prescriptive. *Ortiz v. Spann* 671 S.W. 2d 909 (Tex. App.1984). The Court Ortiz v. Spann, acknowledged that the owners of three oak-trees whose branches overhung adjoining premises might benefit from an easement appurtenant, implied or prescriptive, for the continued encroachment, though striking down a summary judgment in their favor because they did not establish by competent evidence that they met the requirements for establishing as easement of either type. The court declared that , to establish an implied easement running the land, which may arise by grant or by reservation, the party claiming it must prove an original unity of ownership of the dominant and servient estates, that the encroachment was apparent at the time of the property's conveyance, that it was continuous such as to support the parties' intent that its use would by grant, and it was

a finding by this Court that branches and roots can create a property interest does not necessarily mean that in this instance a property interest was created. The factual issues relating to this issue, since they are in dispute, would have to be resolved at trial.

Reasonably necessary to the use and enjoyment of the dominant estate. The parties conceded original unity of ownership and the court found from affidavits by prior owners and neighbors that the use was apparent at the time of conveyance, but, upon its observation that the rules for establishing such an easement must be strictly adhered to, concluded that the evidence was no clear as to the fulfillment of the other requirements. The court also noted that an easement by prescription would exist when there was a use that was open, notorious, adverse, exclusive, uninterrupted, and continuous for a period. Id. Accordingly, actions for easement and adverse possession based on tree branches or roots exist as causes of actions., and as such, this Court should enter summary judgment in Plaintiffs' favor with regard to this issue.

The reasoning in these cases is sound in that if a tree, through its branches and/or roots, is situated such that it notoriously, hostilely, and continuously for 21 years encroaches an adjoining property, it should be treated like any other encroached , and as such a potential easement could be created. Numerous properties throughout the Commonwealth have trees that create a border wit adjoining properties. Defendant Bower admitted that the subject tees were the "boderline" and "kind of like a fence or a hedge." (Bower Dep., p.28, 37, 9 9/02/2002, attached as Exhibit 4 to Plaintiffs' Motion for Partial Summary Judgment.) Bower admitted that she never cut the branches and left the boundary in its natural condi

tion. Id. If that border has existed notoriously, hostilely and continuously for 21 years, an adjoining property owner should not be allowed to take action that would in effect destroy the tree border.

The defendants argue that Plaintiffs Amended Complaint does not establish the requisite 21 years time period because Plaintiffs have not owned their property for at least 21 years. Defendants further assert that Plaintiffs cannot establish "tacking" by prior owners of the property in order to establish the requisite 21 year period. In making this argument, the defendants incorrectly utilize the analysis required in order to create a fee title to land by adverse possession, as opposed to what is at issue in this case, which is the creation of an easement. "Tacking" is generally the adding of a prior owner's, to establish the 21 year period required for adverse possession. *Watkins v. Watkins,* 775 A.2d 841 (Pa.Super.2001). Generally, for "tacking" to occur there must be privity between the successive occupants. *Lekdnak v. Swatsworth*, 33 Pa.D & C 3d 535 (Clearfield Cty, 1984). However, "tacking is not required in establishing an easement, and has only been applied in instances of adverse possession claims of fee title to land. *Id.* citing *Predwitch v. Chrobak,* 186 Pa. Super. 601, 142 A.2d 388 (1958). "Easements pass by conveyance of the estates to which they are appurtenant": *Predwitch*, at 604. In Predwitch, the plaintiff, while owning his property for less than 21 years, asserted the right to an easement for the use of a road on an adjoining property. *Id.* The Court ruled that the duration of the plaintiff' s ownership was not relevant, and that what was relevant, was whether the adverse use by anyone had lasted in excess of 21 years. *Id.*

At issue in this case is a claim by Plaintiffs that the tree roots and branches have created an easement. Plaintiffs have not asserted that they have become owners of the land in question by adverse possession. As such, Plaintiffs do not need to allege in the Amended Complaint that they owned their property in excess of 21 years, or that privity exist in order tot establish a "tacking" of property interests. All that Plaintiffs' need to allege, which they do, is that the adverse use continued for a pried in excess of 21 years. The Amended Complaint asserts that the tree branches and roots have encroached onto the 1185 Property for a period of time in excess of 21 years. (Am. Compl.,¶21).[4] As such, as to the issue of the requisite time period, the Amended Complaint adequately alleges continual use of the easement by the growing of trees branches and roots for a period in excess of 21 years.

Additionally, Pennsylvania Courts have recognized the difficulty of establishing property rights of an ancient origin and such, in claiming a right of ancient origin, the plaintiff is entitled to a relaxed burden of proof. *Ruddy v. Shaner,* 137 Mont. Co. Rptr. 301 (2000). "When a right or title is of ancient origin or where the transaction under investigation is so remote as to be incapable of direct proof....the law, of necessity, relaxes the rules of evidence and requires less evidence to substantiate the fact[in] controversy. " Tomlinson v. Jones, 384 Pa. Super. 176, 179, 557 A.2d 103, 1104 (1989) citing Minteer v. Wolfe, 300 Pa. Super. 234, 240, 446 A.2d 316, 319 (1982); see also Possessky v. Diem, 440 Pa. Super.387, 665 A.2d 1002 (1995); Owens v. Holzhield, 335 Pa. Super. 231, 238m 484 A2d 107, 111 (1984).

2. Plaintiffs Are Entitled To Summary Judgment That The Defendants Trespassed On Their Property And Removed Trees Located On Plaintiffs Property.

Plaintiffs allege in the Amended Complaint that defendants trespassed on their property, and cut down trees thereon without the consent of Plaintiffs. (Am. Compl., ¶ ¶ 82-84). A trespass is committed when intentionally enters land in the possession of another, or causes a thing to do so. Restatement (Second) of Torts §158. "Intent" means either the actors desire to cause the consequences of his act, or he believes that those consequences are substantially certain to

4 Factual support for the assertion of adverse use beyond 21 years exists as evidence by the expert report by Andrew William Graham Jr., attached to Plaintiffs' Motion for Partial Summary Judgment as Exhibits 1.

result. *United States Auto Ass'n v. Elitzky*, 358 Pa. Super. 362, 517 A.2d 982 (1986).

Attached to Plaintiffs' Motion as Exhibit 1 is the report by arboricultural consultant Andrew William Graham, Jr., confirming that at least one tree on the Koreskos' property was cut down. (See Report of Tree Related Damages From Construction and Value of Loss by Andrew William Graham, Jr., p. 3-4, attached as Ex. 1 to Plaintiffs' Motion for Partial Summary Judgment). As such, with regard to the Plaintiffs' trespass cause of action, this Court should find that a trespass has occurred, and thus leave for trial the issues of who among the defendants is liable for the trespass, as well as the question of damages.

3. The Defendants Unlawfully Installed Propane Tanks In The Setback Area Of The 1185 Property, And Even Though The Tanks Were Subsequently Removed And Reinstalled Elsewhere Pursuant To A Valid Permit, Plaintiffs Are Entitled To Damages Including Attorneys' Fees As A Result Of Having To Bring This Action To Force The Removal Of The Tanks.

In the Amended Complaint, Plaintiffs assert that underground propane tanks were unlawfully installed at the 1185 Property. (Am. Compl., ¶ ¶ 34-40). The unlawful installation of the propane tanks was confirmed during the deposition of Michael V. Pilotti, Building Inspector for the Tredyrffin Township. At Mr. Pilotti's deposition, when asked if the tanks were installed in a proper place, he testified that they were not because they were outside of the "building envelope." (See Pilotti Dep., at 15, attached to Plaintiffs' Motion as Ex. 2)

In a letter dated July 5, 20- 02, from Mr. Pilotti to defendant Mark Farley, Mr. Pilotti writes, "[i]t is my understanding that propane tanks have been installed underground at the said properties [the 1185 Property] without obtaining a review and or the required permits to do so. Therefore I have no choice, given the circumstances that to order the removal of the illegal tanks immediately...." (See Ex.2 to Pilotti Dep., attached to Plaintiffs' Motion as Ex.3) As such, any factual dispute as to whether the tanks were unlawfully installed is not longer at issue, and this Court should so rule. In addition, while the tanks were removed, the removal of the tanks was only part of the relief requested by Plaintiffs. There remains a factual question as to the damages suffered by Plaintiffs as a result of the unlawful installation of the tanks. As evident by the date of Mr. Pilotti's letter to defendant Farley [July 5, 2002], the actions by Defendant Tredyffrin Township in forcing the defendants to comply with applicable codes and remove the "illegal tanks" came only after the initiation of this action. As a result, Plaintiffs are entitled to damages and their attorney's fees associated with their having to force the removal of the unlawful tanks.

5. Plaintiffs, As An Adjacent Property Owner, Have A Right To Pursue An Action In Equity To Object To The Subdivision Plan For The 1185 Property To The Extent That It Infringes On Their Property Rights, And Alternatively To Seek Court Intervention To Force Compliance With The Subdivision Plan.

In this case, Plaintiffs, the adjoining landowners, filed this action to object to the Subdivision Plan and alternatively to enforce the relevant ordinances as put forth in the subdivision Plan an notes on that Subdivision Plan. Less that 10 days after issuance of the building permits, the Koreskos' protested the subdivision and building permits. (Am. Compl.

Ex. "A"). Tredyffrin Township ignored the Koreskos' request for enforcement and failed to take action to enforce the relevant ordinances. Plaintiffs, as adjoining landowners, claim that their property rights were violated as they did not receive notice of the subdivision and that the Subdivision Plan failed to list certain details, including boundary trees, that effected their property rights. Furthermore, Plaintiffs aver that the placement of propane tanks in the setback are was in violation of building permits and codes and should be removed. Substantial rights of the plaintiffs have been affected. When the Plaintiffs appealed to the Township, and the Township did nothing, the Plaintiffs were well within their rights to take their grievance to a court of equity.

This Court had jurisdiction to make determinations relating to the lawfulness of the Subdivision Plan and relevant ordinances. The availability of an administrative remedy does not deprive a court of the power to entertain claim challenging an agency's failure to afford the required remedy; and the availability of the administrative remedy bears only on the appropriateness of granting the relief requested.[5] Commonwealth, Dept. of Public Welfare v. Eisenberg, 499 Pa.,530, 454 A.2d 513 (1982). See also, Elkin v. Bell Telephone Co., of Pa., 123, 420 A.2d 371 (1980). The Supreme Court noted:

There has never been any doubt historically, that administrative jurisdiction here is *not* exclusive, and that neighbors have always been able to resort to an action in equity to enforce a zoning ordinance. These cases typically do not involve resort to any special administrative expertise on the part of the zoning or municipal authorities. On the contrary, courts are as well equipped to apply a written ordinance to

given set of facts as is any municipal authority. In short, there is no reason to apply the exhaustion doctrine here.

Frye v. City Mononghela, 526 Pa. 170, 176-177 (1991)

As Justice Nix stated:

Any citizen has a right to seek equitable relief from a continuing infringement upon his or her enjoyment of that person's property rights. The fact that the conduct complained of here violated certain zoning laws is not the gravamen of the case. Rather, the gravamen of the complaint is a violation of the complaint's own property rights and complainant's right to an equitable remedy.

Frye v. City of Monongahela, 526 Pa. 170, 177 (1991).

In *Frye v. City of Monogahela*, an adjacent landowner to Frye constructed structures on their property which were not encompassed in building permit issued to the landowners and which were not permitted by the applicable ordinances. *Id.* Thereafter, *Frye* filed a complaint in equity to enforce the ordinance and to compel the neighboring landowners to remove a pigeon loft on the grounds it was outside the building permit. Relying on Section 617 of MPC, the Court determined that the adjacent landowner *Frye,* as an aggrieved neighbor, had an independent right to seek relief from a violation next door and that right could be asserted in an equity action. *Id.* at 175. Further, the *Fyre* Court held that when "deliberate violations of a zoning ordinance have the effect of wrongfully infringing on the property rights of a neighbors that neighbor is entitled to prompt vindication in a court of equity without regarded to alternated administrative remedies at that might be available. We have always so held

and we continue to do so." *Id.* at 176. The Court held that availability of administrative remedy does not deprive court of power to entertain claims challenging agency's failure to afford required remedy, availability of administrative remedy bears only on appropriateness of granting relief requested. *Id.*

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5 This Court is free to use its equitable powers to balance the relief granted, i.e. Modify subdivision, order removal of driveway, award restitution, etc.

In another recent case, *Penden v. Gambone Bros.*, Development Co., 798 A.2d 305 (Pa.Cmwlth.2002) the homeowners sought a preliminary injunction preventing a developer from constructing an eight-foot fence in place of the vegetative screen which was required by local zoning ordinances. The Court granted and upheld the injunction. Id. In doing so, the Court noted that the 53 P.S. §10617 section entitled, "causes of action," provides:

Id. at 312.

The Pendens, and aggrieved property owner, filed their direct action with the trial court to enforce the ordinances. Id. The court noted that the failure of Borough officials to properly enforce their own ordinances should not run the the Pendens' deteriment. *Id.* at 312. The Court noted: The Borough's approval of the final development plan does not establish compliance with the ordinance, nor it excuse Gambone from erecting an appropriate buffer". *Id.* at 311

Alternatively, this Court can use its equitable powers to enforce terms of the Subdivision Plan. A municipality may approve subdivision plans subject to certain condition's

Bonner v. Upper Makefield Township, 142 Pa. Cmwlth. 205 (1991) The subdivider's failure to object to those conditions constitutes a waiver of the right to seek review. *Id.* Because the subdivider agreed to notation restricting further subdivision, that restriction, which runs with the land, is binding upon all subsequent purchaser. Id. A subsequent purchaser of the property cannot now challenge the propriety of the conditions imposed as part of the original subdivision process. *Doylestown Tp. V. Teeling,* 635 A.2d 657 (Pa.Cmwlth.1993). The MPC specifically permits the imposition of agreed-upon conditions on subdivision approvals. *Id.*

Conditions attached to an approved subdivision plan may be enforced by actions in equity. Board of Com'rs of Lower Merion Tp. v. Haslett, 69 Pa. Cmwlth. 1 (1982). In Haslett, the Court noted that the municipality and any affected third parties had the option of enforcing the subdivision agreement in a separate actions. Id. at 6 n.6. Additionally, conditions contained in a recorded subdivision plan are enforceable even if the conditions are not specifically set forth in the deed conveying the lots created by the subdivision. *Board v. Heppe*, 403 Pa. Super.441 (1991) app. den., 529 Pa. 630 (1991)

Landowners properly have invoked the courts' equity jurisdiction to review such matters in the past. In *Ballard v. Heppe,* 403 Pa. Super.441 (1991) app. den., 529 Pa. 630 (1991), the court held that landowners could enforce by injunction certain unambiguous notes in a subdivision plan relating plan relating to future lot sizes. Id. The Courts also have decided that an injunction should issue to protect lot owners to preserve the residential nature of a development. *Gey v. Beck*, 390 Pa. Super. 317 (1990); See also *Doylestown Township v. Teeling*, 160 Pa. Commw. 397, 405-407 (1993) (conditions attached to subdivision plan as part of approval

process constitute restrictive covenants running with the land and may be enforced in equity.) In *Ballard v. Heppe,* similar notes in a subdivision plan were held to create an enforceable restrictive covenant limiting lot size, despite additional plan language which provided for future changes if approved by the planning commission. 403 Pa. Super at 441.

Although restrictive covenants generally are disfavored by the law, and through the passage of time or a change in condition of the neighborhood may lose utility, covenants of "recent vintage" certainly may be enforced by the granting of injunctive relief. *Gey v. Beck,* 390 Pa. Super. at 326-28. See also *Grasso v. Thimons.,* 384 Pa. Super.593 (1989) app. den. 525 Pa, 612 (1987) (property owners could enjoin neighbor from violating residential use only restrictive covenant) Conditions contained in notes to a subdivision plan may be enforceable even when conditions are not specifically set forth in deed conveying subject property. See *Teeling, supra,* 160 Pa. Cmwlth. at 397; *Perrige v. Horning 654* A.2d 1183 (Pa.Super.1995).

In the present case, Plaintiffs aver that the Subdivision Plan was defective. The Plaintiffs also aver the defendants failed to comply with the Subdivision Plan, including certain notes to the Plan from the Chester County Planning Commission and removed certain trees that were to be retained pursuant to the Subdivision Plan. (Am. Compl.,¶ ¶64, 77, 86, 88). The Chester County Planning Commission clearly understood the importance of the groves of trees, the wooded nature of the residential area, and the preservation of that wooded nature. (See. Bower Dep., Fulton Ltr.. Ex.1) Defendant Bower admitted the wooded nature the lots and the tree boundary. (Id. at 27-28, 37-38). The nature of the lots were

considerably changed by the Defendants' actions. The natural wooded fence between the properties was damaged and is continuing to be destroyed by defendants' actions. (Graham Report).The Tredyffrin Code establishes certain ordinances and requirements that were clearly not followed:

181-43 General Requirements

A. In addition to the standard an requirements contained herein, all land shall be subdivided and developed in compliance with the following:

(1) The Official Map, the Comprehensive Plan, the Zoning Ordinance, the Master Sewage Facilities Plan, the Township Building and Plumbing Codes and all other applicable codes, ordinances or administrative regulations.

(2) The especial rules, regulations and standard of any municipal, county, state or regional planning agency having jurisdiction...

D. Proposed subdivisions and land developments shall be coordinated with existing neighborhoods and shall be consistent and harmonious with the pattern and character of the existing and approved development in such neighborhoods.

F. Every subdivision or land development plan shall be designed to preserve and protect the natural features of the land, including existing grades and contours, bodies of water and watercourses, wetlands, large trees standing alone or in groves, street shade trees and specimen trees, scenic and historic points, pedestrian walks, bicycle paths and bridle trails that have been in public use and other community assets. The burden shall be on the applicant to justify any material changes in the natural features of the land, including those features set forth above, by satisfactory proofs that subdivi

sion or land development would not be feasible without such changes and that there are no practical alternative to the material changes. The Fact that subdivision or land development would involve greater expense or less density because of the maintenance of desirable natural features will not and of itself be considered a justification for changes in the features.

181-56

(1) Protection from mechanical injury.

(a) Prior to any grubbing or clearing, all trees to be retained which are adjacent to areas to be cleared shall be protected fro equipment damage by enclosing the dripline within sections of a safety fence. All exposed roots, trunks and low hanging branches shall be equally protected. Groups of trees may be protected by fencing the entire area where located . Heavy equipment operators shall be careful not to damage existing tree trunks or compact or damage tree roots. Feeder roots shall be cut with pruning sheers or other tools which will make a clean cut.

(b) Tree trunks and exposed roots damaged during construction shall be protected from further damage. Damaged branches shall be sawed off at the branch collar. No shellac or pruning paint shall be used.

(e) The areas around the base of existing tress shall be left open to provide access to water and nutrients. Therefore, no permanent impervious cover, nor storage of equipment, materials, debris or fill, shall be allowed within the dripline of an existing specimen tree or individual tree, standing alone, wit a minimum diameter of six inches....

3. Protection from Excavations. When digging trenches for utility lines, irrigation systems, and other similar uses, the developer shall adhere to the following, listed in order of preference:

(a) Where possible, trenches should bypass the root area.

(b) Where trenches must be dug past the side of a tree, the following precautions shall be observed:

(1) Trenches shall be no closer to the trunk than the distance equal to the dripline.

(2) Cut as few roots as possible.

(3) If roots have to be cut, cut them as cleanly as possible.

(4) Backfill the trench as possible.

(c) When trenching is not feasible at or beyond the dripline and if tunnneling is also not feasible, upon demonstration of this, the Township engineer may permit trenching within the dripline.

Tredyffrin Township Code (West 2001) .

The photos clearly demonstrates that these ordinances and protections of the Koreskos' boundary trees were not followed. (Bower Dep., Ex. 3 and 4). The Boundary trees were not even put on the Subdivision plan as to warrant review by the Planning Commission and the protection offered by the Tredyffrin Township Code. (See Site Plan Bower Dep., Ex.2) The Graham report indicates at least 12 trees had circumferences greater than 29" and as such to be sufficient size (greater than 6") as to warrant protection by the Tredyffrin Township Code (See Graham Report, Ex. 1, p.4) The

trees in question were all part of a boundary group that provided privacy screening between neighbors' properties and created a woodsy setting. Id. at 4 "All the trees had exhisting tree limbs that extended over both the property line and the driveway paving. The excavation construction (on the 1185 property) cut into and destroyed nearly all the roots that extended across the property line from the Koreskos' trees. This would have been in direct opposition to Mr. Fultons's cautionary statement[6] and construction protection best management practices for trees." *Id.* at 5. The photos clearly indicate that excavation for trenches and the driveway took place within the dripline of the boundary trees, counter to the township ordinance, The driveway, in a direct and continuing violation of the Tredyffrin Code, still continues as an impervious cover within the dripline of the Koresko boundary trees. The Defendants do not dispute these facts. The Defendants contend that the Plaintiffs had and have no right any protection for their trees. Beyond the easement rights, the ordinances of the Tredyffrin Township Code provided protection to the Koreskos' boundary trees that was clearly disregarded and violated.

---

6 William T. Fulton in his February 16, 2000 letter to Township Manager Joseph Janasik in which he notes discrepancies with the final subdivision plan for the 1885 property.

6. The plan and a 1995 aerial photograph indicate that a portion of the site is wooded. If development is to occur within the woodlands, the removal of trees should be limited to the minimum area needed for the dwelling an support facilities and the limit of tree removal should be shown on the plan. Any grading within the area the dripline (perimeter of the tree's branches) of the tree to be preserved increases the possibility of tree damage.

(Bower Dep. Fulton Ltr. Ex.1)

This Court should enter summary judgment in favor of Plaintiffs, that Plaintiffs can, as a matter of law, seek court intervention to object to a subdivision plan and/or seek court intervention to compel enforcement of a subdivision plan and relevant ordinances.

IV. CONCLUSION

For the reasons set forth herein, partial summary judgment should be entered in favor of plaintiffs, and against defendants.

Respectfully submitted,

_____

John J. Koresko, V. Esquire
Virginia I. Miller, Esquire
Attorneys for Plaintiff

DATED: NOVEMBER 14, 2002

APPENDIX K – MEMORANDUM IN OPPOSITION TO JUDGMENT ON THE PLEADINGS

KORESKO & ASSOCIATES, P.C.

BY: John J. Koresko, V, Esquire

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(610) 992-2200

ANDERSON KILL & OLICK, P.C.

BY: Virginia I. Miller, Esquire

ATTY I.D. # 85361

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Philadelphia, PA 19103

(215) 568-4202

IN THE COURT OF COMMON PLEAS OF CHESTER COUNTY, PENNSYLVANIA CIVIL ACTION – LAW

John J. Koresko, V., et al	:	
Plaintiffs,	:	
v.	:	NO. 01-05343
Mark Farley, et al.	:	
Defendants,	:	

SUPPLEMENTAL MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS FOR JUDGEMENT ON THE PLEADINGS, AND IN RESPONSE TO THIS COURT'S CORRESPONDENCE OF OCTOBER 28, 2002

Plaintiffs, (collectively, the "Koreskos" or "Plaintiffs"), provide this Supplemental Memorandum of Law in opposition to the motions by the defendants for judgment on the pleadings and in response to this Court' s letter of October 28, 2002.

I. BACKGROUND

The defendants have filed various motions for partial judgment on the pleadings. One issue raised in these motions relates to whether Pennsylvania law recognizes an easement for tree branches or roots. In addition, if Pennsylvania law does recognizes an easement for tree branches and roots, the defendants assert that the Amended Complaint does not allege the requisite period of ownership by Plaintiffs or predecessors in title needed for the establishment of an easement by adverse possession. As set forth herein, Pennsylvania law would recognize an easement for tree branches and roots, and the Amended Complaint, by alleging

that the boundary trees' roots and branches have grown on the 1185 Property for a least 21 years, sufficiently pleads the requisite time period to establish an easement.

II. ANALYSIS

A. Pennsylvania Law Would Recognize An Easement for Tree Roots

Admittedly, there are no cases applying Pennsylvania law that directly answers the question of whether Pennsylvania law[1] recognizes an easement for tree roots and branches. In the defendants' various motions relating to this issue, they fail to cite any Pennsylvania authority that would preclude an easement for trees roots or branches. The defendants, while failing to cite to any case that would preclude an easement for tree roots or branches, cite to Jones v. Wagner, 425 PA. Super 102, 624 A.2d 166 (1993) for the proposition that a property owner generally has the right to cut away to his property line branches and roots from trees of an adjoining owner. (See, e.g. Brief in Support of Motion for Partial Judgment on the Pleadings of Defendants Mark Farley and Seaton Ross, L.P., ¶ 6). While Jones v. Wagner does assert this general proposition, it also addresses the issue of tree branches creating an easement by adverse possession.

We cannot help but wonder whether the continued presence of encroaching tree branches, held openly, notoriously, hostilely, and continually for 21 years would create a prescriptive easement in the airspace which they hang. If this would be the case, **and we can find no Pennsylvania law would indi**

cate that prescriptive easement is not available in this situation, a landowner who suffers actual harm for the first time during the tree owner's twenty- second year of hostile ownership, might very well be precluded from seeking a judicial, or even self-help, remedy.

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[1]No cases have been found expressly ruling on the right of an adjoining landowner to cut off the roots of a boundary tree which has invaded his property. See 26 ALR 3d 1371 (2002). Furthermore in Scarborough v. Woodhill, a California court held that adjoining landowners cannot cut parts of boundary trees if the latter are hereby injured, which would seem to include the roots. Id. citing Scaraborough v. Woodhill, 7 Cal. App. 39, 93 P. 383 (1907).

Id. at ¶ 111, n. 3. (Emphasis added).

While Pennsylvania courts have not speciafically addressed this easement issue, courts in other jurisdiction have, and have determined that an easement can be created. A Texas court recognized that the owner of a tree whose branches penetrated adjoining premises might obtain the right to the air space occupied by the encroachment, if he could establish the elements of an easement appurtenant, whether implies or prescriptive. *Ortiz v. Spann* 671 S.W. 2d 909 (Tex. App. 1984). The Court in *Ortiz v. Spann* acknowledge that the owners of three oak trees whose branches overhung adjoining premises might benefit from an easement appurtenant, implied or prescriptive, for the continued encroachment, though striking down a summary judgment in their favor because they did not established by competent evidence that they met the requirements for establishing an easement of either type. The court declared

that, to establish an implied easement running with the land, which may arise by grant or by reservation, the party claiming it must prove an original unity of ownership of the dominant and servient estates, that the encroachment was apparent at the time of the property's conveyance, that it was continuous such as to support the parties' intent that its use would pass by grant, and that it was reasonably necessary to the use and enjoyment of the dominant estate. The parties conceded original unity of ownership and the court found from affidavits by prior owners and neighbors that the use was apparent at the time of conveyance, but, upon its observation that the rules for establishing such an easement must be strictly adhered to, concluded that the evidence was not clear as to the fulfillment of the other requirements. The court also noted that an easement by prescription would exist when there was a use that was open, notorious, adverse, exclusive, uninterrupted, and continuous for a period. *Id.*

The reasoning in these cases is sound in that if a tree, through its branches and/or roots, is situated such that it notoriously, hostilely, and continuously for 21 years encroaches an adjoining property, it should be treated like any other encroached, and a such a potential easement could be created. Numerous properties throughout the State have trees that create a border with adjoining properties. If that border has existed notoriously, hostilely and continuously for 21 years, an adjoining property owner should not be allowed to take an action that would in effect destroy the tree border.

B. <u>The Amended Complaint Alleges Sufficient Facts To Establish Adverse Use Of The In Question For A Period In Excess Of 21 Years.</u>

The defendants argue that Plaintiffs' Amended Complaint does not establish the requisite 21 years time period because Plaintiffs have owned their property for at least 21 years. Defendants further assert that Plaintiffs cannot

establish "tacking" by prior owners of the property in order to establish the requisite 21 year period. In making this argument, the defendants incorrectly utilize the analysis required in order to create a fee title to land by adverse possession, as opposed to what is at issue in this case, which is the creation of an easement. "Tacking" is generally the adding of a prior owners use of property, in combination with the present owners, to establish the 21 year period required for adverse possession. Watkins v. Watkins, 775 A.2d 841 (Pa. Super. 2001). Generally, for "tacking" to occur there must be privity between the successive occupants. Lednak v. Swatsworth, 33 Pa. D & 3 535 (Clearfield City, 1984). However, "tacking" is not required in establishing an easement, and has only been applied in instances of adverse possession claims of fee title to land. *Id.*, citing Predwitch v. Chrobak, 186 Pa. Super. 601, 142 A.2d 388 (1958). "Easements pass by conveyance of the estate to which they are appurtenant." Predwitch, at 604. In Predwitch, the plaintiff, while owning his property for less than 21 years, asserted the right to an easement for the uses of road on an adjoining property. Id. The Court ruled that the duration of the plaintiff's ownership was not relevant, and that what was relevant, was whether the adverse use by anyone had lasted in excess of 21 years. *Id.*

At issue in this case is a claim by Plaintiffs that the tree roots and branches have created an easement. Plaintiff have not asserted that they have become owners of the land in question by adverse possession. As such, Plaintiffs do not need to allege in the Amended Complaint that they owned their property interests. All the Plaintiffs' need to allege, which they do, is that the adverse use continued for a period in excess of 21 years. The Amended Complaint asserts that the tree branches and roots have encroached onto the 1185 Property for a period of time in excess of 21years. (Am. Compl., ¶ 21).[2] As such, as to the issue of the requisite time period, the Amended Com

plaint adequately alleges continual use of the easement by the growing of tree branches and roots for a period in excess of 21 years.

Additionally, Pennsylvania Courts have recognized the difficulty of establishing property rights of an ancient origin and, as such, in claiming this right of ancient origin, the Plaintiff is entitled to a relaxed burden of proof. Ruddy v. Shaner, 137 Mont. Co. Rptr. 301 (2000). "When a right or title is of ancient origin or where the transaction under investigation is so remote as to be incapable of direct proof ... the law, of necessity relaxes the rules of evidence and requires less evidence to substantiate the fact [in] controversy." Tomlinson v. Jones, 384 Pa. Super 176, 179, 557 A.2d 103, 1104 (1989) citing Minteer v. Wolfe, 300 Pa. Super. 234, 240, 446 A.2d 316, 319 (1982); see also Possessky v. Diem, 440 Pa. Super. 387, 665 A.2d 1002 (1995); Owens v. Holzheid, 335 Pa. Super. 231, 238, 484 A.2d 107, 111 (1984).

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[2]While the allegations set forth in the Amended Complaint must be accepted as true for the purpose of ruling on the defendants' motion for partial judgment on the pleadings, factual support for the assertion of adverse use beyond 21 years exists as evidenced by the expert report by Andrew William Graham, Jr., attached to Plaintiffs' Motion for Partial Summary Judgment as Exhibit 1.

C. The Amended Complaint Alleges Sufficient Facts To Establish Violation of the Treyffrin Township Ordinances and Violation of the Subdivision Plan.

In the present case, Plaintiffs aver that the Subdivision Plan was defective. The Plaintiffs also aver that the defendants failed to comply with the Subdivision Plan, including certain notes to the Plan from the Chester County

Planning Commission and removed certain trees that were to be retained pursuant to the Subdivision Plan. (Am. Compl., ¶¶ 64, 77, 86, 88). The Chester County Planning Commission clearly understood the importance of the groves of trees, the wooded nature of the residential area, and the preservation of that wooded nature.[3]

The Tredyffrin Code establishes certain ordinances and requirements that were clearly not followed:

181- 43. General Requirements.

A. In addition to the standard and requirements contained herein, all land shall be subdivided and developed in compliance with the following:

(1) The Official Map, the Comprehensive Plan, the Zoning Ordinance, the Master Sewage Facilities Plan, the Township Building and Plumbing Codes and all other applicable codes, ordinances or administrative regulations.

(2) The especial rules, regulations and standard of any municipal, county, state or regional planning agency having jurisdiction. ...

D. Proposed subdivisions and land developments shall be consistent and harmonious with the pattern and character of the existing and approved neighborhoods.

F. Every subdivision or land development plan shall be designed to preserve and protect the natural features of the land, including existing grades and contours, bodies of water and watercourse, wetlands, large trees standing alone or in groves, street shade trees and specimen trees, scenic and historic points, pedestrian walks, bicycle paths and bridle trails that have been in public use and other community assets.

The burden shall be on the applicant to justify any material changes in the natural features of the land, including those features set forth above, by satisfactory proofs that subdivision or land development would be feasible without such changes and that there are no practical alternative to the material change. The fact that subdivision or land development would involve greater expense or less density because of the maintenance of desirable natural features will not in and of itself be considered a justification for changes in the features.

---

[3]Additionally Defendant Bower admitted the wooded nature of the lots were considerably changed by the Defendants' actions. The natural wooded fence between the properties was destroyed by Defendants' actions. (See Bower Dep. Pp. 28, 37-38). If needed, Plaintiffs can further amend the Complaint to put these facts into the Amended Complaint.

181-56

(1) Protection from mechanical injury.

(a) Prior to any grubbing or clearing, all trees to be retained which are adjacent to areas to be cleared shall be protected from equipment damage by enclosing the dripline within sections of a safety fence. All exposed roots, trunks and low hanging branches shall be equally protected. Groups of trees may be protected by fencing the entire area where located. Heavy equipment operators shall be careful not to damage existing tree trunks or compact or damage tree roots. Feeder roots shall be cut with pruning shears or other tool which will make a clean cut.

(b) Tree trunks and exposed roots damaged during construction shall be protected from further damage.

Damaged branches shall be sawed off at the branch collar. No shellac or pruning paint shall be used.

(c) The areas around the base of existing trees shall be left open to provide access to water and nutrients. Therefore, no permanent impervious cover, nor storage of equipment, materials, debris or fill, shall be allowed within the dripline of an existing specimen tree or individual tree, standing alone, with a minimum diameter of six inches....

3. Protection from Excavations. When digging trenches for utility lines, irrigation systems, and other similar use, the developer shall adhere to the following, listed in order of preference:

(a) Where possible, trenches should bypass the root area.

(b) Where trenches must be dug past the side of a tree, the following precautions shall be observed:

(1) Trenches shall be no closer to the trunk than a distance equal to the dripline.

(2) Cut as few roots as possible.

(3) If roots have to cut, cut them as cleanly as possible.

(4) Backfill the trench as possible.

(c) When trenching is not feasible at or beyond the dripline and if tunneling is also not feasible, upon demonstration of this, the Township engineer may permit trenching within the dripline.

Tredyffrin Township Code (West 2001).

Plaintiffs aver that the construction of the driveway, water line ditch, and other improvements have damaged and will continue to damage trees on Plaintiffs' property. (Am. Compl., ¶ 42). The pictures clearly demonstrate that these protections of the Koreskos' boundary trees were not followed. (Bower Dep. Ex. "3" and "4"). The boundary trees were not even put on the Subdivision plan as to warrant review by the Planning Commissions. (*See* Am. Compl., ¶ 43, Site Plan Bower Dep. Ex. "2"). The Graham report indicates at least 12 trees had circumferences greater than 29" and to warrant review by the Planning Commissions. (*See* Graham Report, Ex, "1", at 4). The trees in question were all part of a boundary group that provided privacy screening between neighbors' properties and created a woodsy setting. *Id.* at 4. "All the trees had existing tree limbs that extended over both the property line and the driveway paving. The excavation construction (on the 1185 property) cut into and destroyed nearly all the roots that extended across the property line from the Koresko's trees. This would have been in direct opposition to Mr. Fulton's cautionary statement4 and construction protection best management practices for trees." *Id.* at 5. The photos clearly indicate that excavation for trenches and the driveway took place within the dripline of the boundary trees, counter to the township ordinance. (Bower Dep., Exs.). Additionally, the driveway, in a direct and continuing violation of the Tredyffrin Code, still continues as an impervious cover within the dripline of the Koresko boundary trees. In a letter to the Township did nothing to protect Mr. Koresko's rights despite being on notice. The Defendants do not dispute these facts. The Defendants contend that the Plaintiffs had and have no right to protection for their trees. Beyond the easement rights, the ordinances of the Tredyffrin Township Code provided protection to the Koreskos' boundary trees that was clearly disregarded and violated. If needed the Amended Complaint can be further amended to demon

strate these violations of the ordinances and these pertinent facts.

III. CONCLUSION

For the reasons set forth above, the defendants' motions for partial summary judgment that Pennsylvania law does not recognize as easement by tree branches and roots should be denied.

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4 William T. Fulton in his February 16, 2000 letter to Township Manager Joseph Janasik in which he notes discrepancies with the final subdivision plan for the 1885 property states:

6. The plan and a 1995 aerial photograph indicate that a portion of the site is wooded. If development is to occur within the woodlands, the removal of trees should be limited to the minimum area needed for the dwelling an support facilities and the limit of tree removal should be shown on the preserved increases the possibility of tree damage.

Bower Dep, Ex. 1.

Respectfully submitted,

John J. Koresko, V. Esquire

Virginia I. Miller, Esquire

Attorneys for Plaintiff

APPENDIX L – EXHIBIT TO OPPOSITION TO JUDGMENT ON THE PLEADINGS: ARBORIST'S REPORT

Report on Tree Related Damages from Construction and Value of Loss

Prepared for:

Anderson Kill & Olick, P.C.

1600 Market Street

Suite 500

Philadelphia, PA 19103

Re:Korersko v. Mark Farley et al, Chester Co. No. 01-53433

Prepared by:

Andrew William Graham, Jr.
Arboricultural Consultant

1778 Turk Road, Doylestown, PA 18901 – (215)348-5932 or (215) 247-5777 extension 144

September 26, 2002

Report on Tree Related Damages from Construction and Value Loss **September 26, 2002**

Background:

On 28 February 2000, the Board of Supervisors of Tredyffrin Township in Chester County, Pennsylvania approved the final subdivision (Project No. 98130 RKW Engineering Services) for subdividing a property located at 1185 Seaton Ross Road. As this subdivided property was developed with two single-family homes during that same year, a driveway access was constructed immediately adjacent to the property owned by John Koresko. In constructing this driveway and providing access for utility services, the roots of trees whose trunks are on the Koresko property had extended over the property line and had extended over the line for more than 21 years. He further contends that since objection were not made nor were any attempt made ot control the growth of these trees for over 21 years, that the trees now establish an easement right. Furthermore, the Township's approval of the sub-division plan allowed damage to be done to the Koresko tree's roots and that the Koresko's now claim they are entitled to compensation for their loss from the root damage.

In addition, two trees whose trunks were on the Koresko's side of the property boundary were cut down.

Assignment:

As a consulting arborist, I was asked to: 1) establish the age of the trees impacted by the driveway and utility service construction that occurred adjacent to the driveway: 2) establish the growth rate of tree roots under normal conditions in this region; 3) describe the normal depth and extent of tree roots; 4) quantify the extent of roots damaged for each tree; and 5) establish a monetary value of loss for each tree.

Methodology:

As part of my review of this case I also reviewed the following documents and photographs:

1. Letter dated 9 July 2001 from John J. Koresko of Koresko & Associates, P.C. to Vincent M. Pompo of Lamb, Windle & McEarlane, P.C. with attached reduction of subdivision plan
2. Letter dated 16 February 2000 from William H. Fulton to Joseph A. Janasik, Secretary/Manager Tredyffrin Township:
3. Copy of subdivision plan with highlight of note referring to Chester County Planning Commission letter;
4. Selected enlargements of plan;
5. Five 8.5 by 11 glossy color photographic enlargements showing details of the site and construction activity near the trees;
6. Eleven 8.5 by 11 color photographic enlargements showing details of the site and construction activity near the trees – three of these are duplications of the glossy photographs listed in item 5.

Furthermore, my report is based on my own site investigation and measurements. On 26 August 2002, I met with John Koresko, inspected the trees and the site, and took measurements and digital photographs. I was shown the 4 inch concrete property corners that were spray painted florescent orange with a iron reinforcing rod pin driven next to it on which flagging tap had been tied. One the property corners was observed close to Seaton Ross Road and the other located nearly 200 feet from it adjacent to the new neighbor's driveway. I established a straight line connecting both the property corners by use of two lengths of ½ inch diameter

rope tied tightly between them. Observations were made as to the position of the trees and tree stumps in relation to this rope line.

The trees adjacent to the driveway were inventories and measured. Eleven living standing trees were assigned numbers starting closet to Seaton Ross Road. Each tree was assigned an inventory number in sequence as it was encountered along the property line. The circumference of each tree was measured at 4.5 feet above the ground (standard height). The perpendicular distance was recorded from the side of the tree trunk to 1) the property line, 2) the edge of the driveway paving, and 3) the longest limb extending over the driveway. Notes were made concerning the condition of the tree.

A tree stump was found by digging away several inches of soil that had been placed over it. Diameter measurements were made across the cut surface. A triangular shaped wood sample was cut off the stump. The triangular wood sample was approximately one inch thick, had a base measurement of approximately 5.5 inches and a height of 2.5 inches. Two ¼ inch increment bore wood cores were extracted from Norway Maple #3 and White Oak #11. All samples were placed in plastic sample bags and labeled. These sample bags were propped open for drying purpose before permanent storage in the sealed bags.

Annual ring counts were conducted on the two increment core samples. It was unnecessary to make any preparation before conducting the ring counts.

Prepared by: **A. William Graham, Jr. – ASCA Registered Consultant**

1778 Turk Road, Doylestown, PA 18901

Report on Tree Related Damages from Construction and Value Loss **September 26, 2002**

Observations:

Eleven standing living trees and one stump were inventoried. John Koresko told me that there had been one additional stump where a tree on his property had been cut down. I was unable to find the second stump although I dug several places looking for it.

My site measurements are recorded in the following chart:

Inv. No	Tree Name	Tree Circ.	Dist/ Property L+	Dist/Paving	Dist/Dripline
1	Black Gum	48"	4'3"	5'6"	13'
2	Norway Maple	43" & 63"	12'6"	16'	31'
3	Norway Maple	40"	3'11"	7'	30'
4	Sassafras	29" & 43"	8'	10'8"	14'
5	Black Gum	36"	3'6"	5'2"	21'
6	White Oak	67"	2'9"	4'9"	24'
7	Hickory	44"	1'6"	3'6"	11'

8	Norway Maple	34"	9'8"	12'	18'
9	Norway Maple	26"	3'6"	6'6"	20'
10	Norway Maple	29"	7'9"	10'9"	14'
11	White Oak	66"	12'9"	15'11"	28'
12	Stump	22"**	6"	2'6"	?
13	Stump	?	?	?	?

Chart #1: Tree and Tree Location Measurments

*Tree Circumference measured at 4.5 feet above the ground (standard height).

**The average between the longest and shortest stump diameter was multiplied times pi to obtain the average circumference

+The horizontal distances from the side of the tree closest to the driveway to the property boundary.

†The horizontal distances from the side of the tree closet to the driveway to the edge of the driveway paving.

¤The horizontal distance from the side of the tree closet to the driveway to the end of the longest branch extending beyond the property line.

The wood of the stump sample from Stump #12 was still firm and hard indicating that it had not degraded significantly. In addition, I observed no holes or cavities in its surface. I observed that the stump still had intact bark that I peeled back before taking the wood sample. This indicates that the tree was alive when cut.

Although the annual growth rings are sometimes difficult to count on diffuse porous wood such as Norway Maple, I was able to determine that Norway Maple #3 was at least 45 years old. I was able to easily count the rings porus wood of White Oak #11 and determine that it is at least 112 years old. The 9 3/8-inch long wood core of the White Oak was nearly long enough to find its center.

The trees in question were all part of a boundary group of trees that provided privacy screening between the neighbors' properties and created a woodsy setting. The trees provided high shade with some lower branches that provided visual screening.

Prepared by: **A. William Graham, Jr. – ASCA Registered Consultant**

1778 Turk Road, Doylestown, PA 18901

Report on Tree Related Damages from Construction and Value Loss **September 26, 2002**

Discussion:

Tree Preservation Standards on Construction Sites

Tree roots provide anchorage, structural stability, and water and nutrient absorption necessary for safe, healthy trees. Tree roots may grow for extension distances from the tree's trunk. Some studies indicate that the tree's height is a more accurate estimate of the extent to root growth away from the tree. Most roots of tree species, such as those in question found on the Koresko's Property, grow shallowly in the soil and seldom growing deeper than 18inches. The depth tree roots will grow is limited by available atmospheric oxygen.

To be available to tree roots, oxygen must be able to diffuse into the soil. Oxygen diffusion depends on the spaces or gaps between soil particles or aggregates of soil particles. Shallow rooting depth of trees is especially typical of heavier oxygen-limited soils containing moderate or greater amounts of clay such as on the Koresko Property.

It is seldom necessary to protect all of the tree's roots to their full length. A common rule-of-thumb used of tree protection is the tree's dripline is the circular area beneath the tree's branches determined by scribing a circle around the trunk using the longest branch as the radius.

William H. Fulton mentions the dripline in his 16 February 2000 letter to Joseph A. Janasik in which he notes discrepancies with the subdivision plan for 1185 Seaton Ross Road.

> *6. The plan and a 1995 aerial photograph indicate that a portion of the site is wooded. If development is to occur within the woodlands, the removal of trees should be limited to the minimum area needed for the dwelling and support facilities and the limit of tree removal should be shown on the plan.* ***Any grading within the area of the dripline (perimeter of the tree's branches) of the trees to be preserved increases the possibility of tree damage.*** "[Emphasis added[

All the trees that I measured had existing tree limbs that extended over both the property line and the driveway paving. The driveway was constructed immediately adjacent to the property line. In constructing the driveway, 12 to 18 inches of soil was excavated to create room for the ballast rock used as a foundation for the driveway. Because of the characteristic shallow growth of tree roots, this driveway excavation cut into and destroyed nearly all the roots that extended across the property line from the Koresko's trees. This would have

been in direct opposition to Mr. Fulton's cautionary statement and construction protection best management practices for trees.

Tree Easement

According to John J. Koresko's claim, if his trees had extended their roots and/or their limbs over the property boundary and had done so for more than 21 years prior to their damage without complaint issued by the neighbor, the trees would have established an easement right.

Prepared by: **A. William Graham, Jr. – ASCA Registered Consultant**

1778 Turk Road, Doylestown, PA 18901

APPENDIX M – EXCERPTS FROM DEPOSITION OF OLLIE BOWER WITH EXHIBITS

IN THE COURT OF COMMON PLEAS IN AND FOR

THE COUNTY OF CHESTER, PENNSYLVANIA

CIVIL DIVISION

JOHN J. KORESKO, V., et al., NO. 01-05343

Plaintiffs

Vs.

MARK FARLEY, et al.,

Defendants

DEPOSITION OF OLLIE BOWER

Friday, September 6, 2002

Commencing at 1: 30 P. M.

20 N. Church Street

Official Court Reporters

West Chester, Pennsylvania

COUNSEL APPEARED AS FOLLOWS:

VIRGINIA I. MILLER, ESQUIRE

For the plaintiffs

ROBERT W. LENTZ, ESQUIRE

For the Defendants Mark Farley and

Seaton Ross, L. P.

HENRY N. PORTNER, ESQUIRE

For the Defendant Ollie Bower

DANIEL R. BUSH, ESQUIRE

For the Defendant Tredyffrin Township

Reported By:

Paquito Z. Foronda, RMR

Official Court Reporter

Ollie is on the cautious side with respect to her personal things. I've given latitude. I'm not uncomfortable in counsel continuing. If I am, I will speak up.

THE WITNESS: Okay

BY MS. MILLER:

Q. Back to the site plan, you see different depictions of trees on this; is that correct? You see, for instance—

A. A beech and a hickory and a beech.

Q. Okay. Are you familiar with those trees?

A. Not individual trees. What I am familiar with is all along this border, there was nothing but scrub and junk and trash which had been dumped there. Along this line, I did—I don't remember these individual trees but there was a whole line of diseased sticks, which were once hickories—not hickory, which were once hemlocks.

MR. LENTZ: The record will indicate that the witness is indicating the area of the proposed driveway adjacent to the property of Mark Farley.

BY MS. MILLER :

Q. Trees that were on—

A. On Mark Farley's property now.

Q. You're not talking about the trees that were on the Koresko side?

A. Well, they were all along here and I left the hemlocks so that it would be like a borderline

there on my property and they were all along here.

Q. Okay. You're talking about the ones that are on your property?

A. Yeah.

Q. Are you familiar with the trees that were on the Koresko Property, on the other side of that?

A. As I said, there was just junk there.

Q. Would you—

A. It was just brush and scrub and trash and things that were dumped there. There was an old driveway right here.

Q. Okay. Were you familiar with a considerable White oak tree that had a circumference of Approximately 70 inches that was on that Side?

A. On my side?

Q. On Mr. Koresko's side?

A. No.

Q. Were you familiar- -

A. As far as I know, he didn't have very large trees on his property. All of the large trees on Mr. Koresko's property were—do you

have that other little map? Let me show you –

MR. PORTNER: Referring to Bower 2.

Single fall and clean up around my entire property.

Q. Did you normally do it yourself or did you use a service?

A. I used Brian Crowl, who came from Morrisville, Pennsylvania, near Yardley. He's my nephew. I paid him but he's my nephew and he usually came in December, when the red oaks finally dropped their leaves.

Q. Did you ever cut the branches from the trees that were on the boundaries?

A. No, because they were junk. They weren't worth the money.

Q. Did you ever tell any of the neighbors that their trees were in any bad condition, needed to be removed or- -

A. The tree on the Zellmans fell across my property. While they were there, I asked them if they would remove it and they said that they didn't have to because it fell on my property. It was an act of God so I had to clean it up. I didn't investigate that.

Q. Are you saying that you pretty much left the Boundary in the condition that it grew?

A. Yes. I considered it kind of like a fence or a hedge, you know.

Q. Are you saying that you considered it like a natural fence?

A. Well, a hedge, you know, so that nobody would walk through it. There were a lot of brambles and things like that.

Q. Have you been out to see the property?

A. Once.

Q. Since the houses went up?

A. Yes.

Q. So you're familiar with the driveway that went in and some of the other - -

A. Yes.

MS. MILLER: I am going to mark this one Bower 6.

(Bower Exhibit No. 6 was marked for identification.

MR. PORTNER: Could I see that?

MS. MILLER: Yes. This was used at the Koresko and Farley depositions.

BY MS. MILLER:

Q. Are you able to identify that photo?

A. This is the fence that Mark Farley put up immediately, while I was still living in the house, after he owned the property. I was renting from him.

MR. LENTZ: Indicating an orange fence?

THE WITNESS: Yes. He told me that he always does that to protect the neighbor next door.

(2) Supreme Court, U.S.
FILED

04-661 NOV 8 2004

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

BONNIE J. KORESKO and
JOHN J. KORESKO, V,

Petitioner

v.

MARK FARLEY, SEATON ROSS, L.P., TOWNSHIP OF TREDYFFRIN, BRYN MAWR CUSTOM HOME, INC., and OLLIE BOWER,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

APPENDIX VOLUME II

JOHN J. KORESKO, V., ESQUIRE
200 West Fourth Street
Bridgeport, PA 19405
(610) 992-2200
Petitioner Pro Se and on Behalf of Bonnie Koresko

Wright Appellate Services
(215) 733-9870 • (800) 507-9020 • Fax (215) 733-9872

APPENDIX

Exhibits to Appendix H 405a

Exhibits to Appendix J 455a

Exhibits to Appendix L 457a

Exhibits to Appendix M 462a

Appendix N – **Excerpts** From Unconsolidated Pennsylvania Statutes Title 53 Municipal Corporations 478a

Exhibits to Appendix H

ANDERSON KILL & OLICK, P.C.
BY: Virginia Miller, Esquire
Identification No. 85361
1600 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 568-4202

Attorney for Plaintiffs

JOHN J. KORESKO, V, et al.,

Plaintiffs,

v.

MARK FARLEY, et al.,

Defendants.

COURT OF COMMON PLEAS
CHESTER COUNTY, PA

NO. 01-05343

NOTICE OF ORAL DEPOSITION

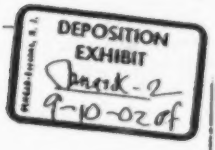
TO: Joseph A. Janasik
c/o Susan C. Mangold, Esquire
Lamb, Windle & McErlane, PC
24 East Market Street
P.O. Box 565
West Chester, PA 19381-0565

PLEASE TAKE NOTICE that, in accordance with the applicable Rules of Civil Procedure, plaintiffs, by their attorney, will take the oral deposition of, Joseph A. Janasik before a person duly authorized to administer oaths, on Tuesday, September 10, 2002, at 1:00 p.m., at the Office of the Court Reporter, 20 North Church Street, West Chester, PA 19380 and to continue from day to day until completed.

The deponent is directed to bring with him to the deposition all documents including, but not limited to any and all investigative/inspection notes, reviews, permits, reports, permit applications, plot plans, inspection requests, and correspondence relating or referring to the property located at 1175 and 1185 Seaton Ross Road, Radnor, Pennsylvania.

PHDOCS:30881.1

DEPOSITION EXHIBIT
Janasik-1
9-10-02-of



Koresko & Associates

A PROFESSIONAL CORPORATION

John J. Koresko, V *
James D. Bomsey **

Attorneys

508 North Gulph Road
Suite 501
King of Prussia, Pennsylvania 19406
(610) 993-2200
Fax (610) 992-1091

* Certified Public Accountant
* Also Admitted in Florida
** Also Admitted in New Jersey

June 6, 2000

Mr. Dennis Torres
Tredyffrin Township
1100 Dupont Road
Berwyn, PA 19312

Fax 610-993-9185

Re: Construction project
1175/1185 Seanna Ross Road
Demand for cease and desist order

Dear Mr. Torres:

This will confirm my telephone conversation with you today. I am the owner of the property at 1159 Seanna Ross Road. I worked closely with Eric Hawkins on this project.

It has come to my attention that the 2+ acre parcel at 1185 Seanna Ross Road has been sold. This is the parcel adjacent to mine. I understand that building permits have been issued for the construction of new houses. In fact, construction has been done. You represented to me that Mark Farley is the builder. I wanted to make you aware of my opposition to this project, and certain ordinances or conditions of subdivision which may have been violated.

First, when I purchased my property, I investigated the adjoining property (1185) and determined that it had not been subdivided. In the three years I have owned my property, I have received no notice of any proposed subdivision. Therefore, I respectfully request all information regarding the subdivision, especially the lay-out of the flag lot. There was no flag lot on any tax map. Since I believe notice of the subdivision was not properly given, I submit that the construction should be stopped.

Secondly, the property in question was heavily wooded in the rear. There appeared to be ground water accumulations which resulted in the growth of foliage common to wetlands. In addition, I believe there may be other types of protected foliage. I believe these need to be inspected. As of the moment, bulldozers are involved in destroying evidence. The forest involved is home to numerous species of wildlife, and I am sure no consideration has been given to the destruction planned in this matter.

Third, Mr. Hawkins told me that the Township requires that contractors have demonstrated financial abilities and an absence of problems before they will be issued licenses. Please be advised that Mark Farley was the subject of Chapter 11 Bankruptcy proceeding in the Eastern District of Pennsylvania, case no. 92-13203 BIF (jointly administered with no. 92-13202 DAS). Although the case appeared to be closed in 1994, Mr. Farley defaulted on his Chapter 11 plan, thus leaving many creditors unpaid. I believe that this type of behavior disqualifies Mr. Farley from being an appropriate licensee for construction in Tredyffrin Township. Moreover, I believe that an investigation should be done as to the status of unpaid

BEST AVAILABLE COPY

[illegible] Dennis Torres
[illegible] 5, 2000
[illegible] 2

affiliates were involved in. Because of Farley's prior financial debacles, I believe that investigations should be done to assess his solvency.

I believe any building permits for multiple houses will place undo strain on sewer and water utilities that exist on Seaton Ross Road. Initially, the 1135 property as well as 1139 were on septic systems. The sewers were obviously constructed with the number of houses in mind that were apparent at that time. Water pressure in that area is already suspect. The construction of two houses, instead of one on the 1135 parcel I believe should be restricted until further inspection of feasibility.

The construction of the flag lot next to my property and the placement of the driveway will result in new drainage problems which appear probable of damaging my property, including the undermining of my pool and the structures beneath the surface of the ground which support the new grading on my property. The properties slope backward from the roadway, approximately 20 feet in grade to the back of the property. Increased water flow is inevitable because of the driveway. Since I was never given the chance to participate in the process, it appears that drainage effects were overlooked.

Already, Prudential Fox and Roach are in violation of the sign ordinance. There are two signs on the property which exceed the maximum allowable for real estate signs.

There are numerous children in the area. The roads are not wide enough nor well enough maintained to accommodate the traffic of the construction of these houses, both of the equipment and the increased use. There is a very sharp corner at the Seaton Ross and Hobbs that barely accommodates the traffic, and it will get progressively unsafe with these new houses.

I believe the workmen are already in violation of ordinances concerning public nuisances, as they have begun their slashing, cutting and grinding quite early in the morning.

In general, I believe these permits should not have been issued. I believe there has been an error in the subdivision process. Finally, I believe the building plans are probably defective in numerous respects.

I respectfully demand that all construction immediately be ceased until these concerns are addressed. In addition, I request that you make immediately available to me all documents and license applications in connection with Farley and this project so that I may make inspection at the Township building. I am especially interested in the file concerning the alleged subdivision.

Thank you for your kind consideration of these matters.

Very truly yours,

John J. Kovesko, V

JJK/
enclosures

408a

Koresko & Associates

A PROFESSIONAL CORPORATION

Address
630 N. Gulph Road
Suite 301
King of Prussia, Pennsylvania 19406
(610)992-3330
(610)992-4099

Fax Cover Sheet

Date: 6/6/00

To: Mr Terry Woodman Asst Twp Mgr Fax Number: 610 993 9188

From: John Koresko Pages including cover: 2

RE: Bldg permit C6519

Notice of appeal of Bldg permit

PLEASE CALL IF ALL PAGES ARE NOT RECEIVED OR IF FACSIMILE QUALITY IS POOR

DEPOSITION EXHIBIT
3 Danzik
9-10-02 DF

Received Jun-07-00 02:20pm from CCITT G3 - TREDYFFRIN TOWNSHIP page 2
JUN-07-2000 14:22 P.02/02

Koresko & Associates

A PROFESSIONAL CORPORATION

Attorneys

John J. Koresko, V *°
Jeanne D. Bonney **

500 North Gulph Road
Suite 501
King of Prussia, Pennsylvania 19406
(610) 992-2200
Fax (610) 992-1091

° Certified Public Accountant
* Also Admitted in Florida
** Also Admitted in New Jersey

June 7, 2000

William H. Lamb, Esquire
Lamb, Windle & McErlane, P.C.
24 E. Market St., P.O. Box 565
West Chester, PA 19381-0565

Fax 610-692-6210

Re: 1175/1185 Seaton Ross Road
Tredyffrin Township, PA
Appeal of Building Permit No. C6519

Dear Mr. Lamb:

I am writing to you in your capacity as Solicitor for Tredyffrin Township. I am the owner of the property located adjacent to the above referenced parcel. A building permit was issued on May 30, 2000 relating to a new residential construction project at 1175 Seaton Ross Road.

I spoke to officials at Tredyffrin Township, and sent the attached correspondence. For reasons stated therein, and other reasons, we hereby APPEAL the issuance of the building permit to the Zoning Hearing Board.

I would appreciate it if you would immediately advise the Township that this permit is suspended pending disposition of the appeal. Already, there has been the beginning of construction. This has resulted in the blockage of Seaton Ross Road with construction vehicles so as to create a safety hazard. In addition, construction workers have begun trespassing on my property.

Thank you for you kind consideration. I look forward to hearing from you.

Very truly yours,

John J. Koresko, V

JJK/
enclosures

TOTAL P.02

3

Koresko & Associates

A PROFESSIONAL CORPORATION

Attorneys

John J. Koresko, V *
Jeanne D. Bonacy **

500 North Gulph Road
Suite 501
King of Prussia, Pennsylvania 19406
(610) 992-2200
Fax (610) 992-1091

* Certified Public Accountant
* Also Admitted in Florida
** Also Admitted in New Jersey

July 9, 2001

Vincent M. Pompo, Esquire
Lamb, Windle & McErlane, P.C.
24 E. Market St., P.O. Box 565
West Chester, PA 19381-0565

Fax 610-692-6210

Re: 1175/1185 Seaton Ross Road
Tredyffrin Township, PA
Violations of Subdivision Plan
Koresko v. Farley, No. 01-05343 (Chester Co. C.C.P.)

Dear Mr. Pompo:

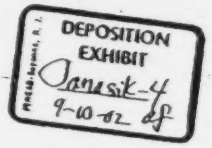
I am writing to you in your capacity as associate to the Solicitor for Tredyffrin Township. I am the owner of the property located adjacent to the above referenced parcel. As you know, I filed an equity complaint in Chester County to gain redress against the developer, Mark Farley and his affiliated entities.

I have enclosed a copy of the subdivision plan for your review. The Complaint notes the violations of the plan, but I have noted on the plan the locations of five trees that Farley cut down on the property, as well as three trees cut down on adjacent properties.

According to the notes on the plan, it was supposed to be implemented consistent with the letter from the Chester County Planning Commission, dated February 16, 2000. A copy of the letter is enclosed. That letter stated specifically at page 2, paragraph 6, that trees shown on the plan were to be maintained. ["The limit of tree removal should be shown on the plan."] Moreover, the letter contained a proviso that construction should not take place within the tree drip-line, as this would result in damage to trees and roots.

A close look at the plan shows that the Township was deceived. First, it is clear that the plan does not show the trees of adjoining landowners, like me. If those trees had been displayed, the Township would have seen that Farley was planning to build within the drip-lines of those trees. Of course, the drip lines are also the approximate location of roots. The letter from the planning commission contemplated protection of these items.

Second, the plan shows some trees that were to be cut down. I respectfully submit that there were far more trees on the lot, and far more trees were cut down. This can be demonstrated by visiting the lot. One will see that there are mature hardwood trees on the lot that are not on the plan.



Third, the plan shows trees that were to be maintained. On the plan I have enclosed, I have marked with a red "X" and number the "maintained trees" that have been removed from the site.

Fourth, the plan shows the location of the front house as being directly in front of the rear house. This is the configuration that the Township approved. Subsequently, Farley moved the front house to the northwest corner of the front lot.

Fifth, the Farley has done construction within the 25 feet side-yard set-backs. For each house, Farley buried a 1,000 gallon propane tank in the set-back. This was not shown on the plan, and I am sure it would not have been approved. These tanks are very close to each house, as well as to the property lines. The approximate location of the tanks is drawn on the enclosed plan.

Sixth, I have shown on the plan where the driveway to the back lot has crossed the lot line onto my property.

Generally, Farley violated the plan by interfering with the rights of adjoining landowners and damaging my property. He also intentionally disregarded the conditions of subdivision mandated by the Chester County Planning Commission and incorporated by reference into the plan via the note.

If you have any other questions, I will be happy to answer them for you. I look forward to hearing from you.

Very truly yours,

John J. Koresko, V

JJK/

enclosures

cc: Virginia I. Miller, Esquire

THE COUNTY OF CHESTER

COMMISSIONERS:
Karen L. Martynick, Chairman
Colin A. Hanna
Andrew E. Dinniman

WILLIAM H. FULTON, AICP
Executive Director

PLANNING COMMISSION
Government Services Center, Suite 270
601 Westtown Road
P.O. Box 2747
West Chester, PA 19380-0990
610-344-6285
FAX: 610-344-6515

EXHIBIT

February 16, 2000

Joseph A. Janasik, Secretary/Manager
Tredyffrin Township
1100 Duportail Road
Berwyn, PA 19312

Re: Final Subdivision – 1185 Seaton Ross Road (Ollie J. Bower)
10701 – Tredyffrin Township

Dear Mr. Janasik:

A final subdivision plan entitled "1185 Seaton Ross Road", prepared by RKW Engineering Services, dated October 11, 1999 and last revised December 9, 1999, was received by this office on January 21, 2000. The subdivision is situated on the east side of Seaton Road south of Hobbs Road and involves the creation of a 1.34 acre parcel (Lot 2) from the existing 2.24 acre parent tract (tax parcel 43-7J-8). There is an existing residence on Lot 1 (0.77 acres). The lots will be served by public water and sewer. The project site is located in the R-1 Residence zoning district. We note that a portion of this site adjoins Upper Merion Township in Montgomery County to the north.

This plan is reviewed by the Chester County Planning Commission in accord with the provisions of Section 502 of the Pennsylvania Municipalities Planning Code (MPC). This report does not review the plan for compliance to all aspects of your ordinance, as this is more appropriately done by agents of the Township. We offer the following comments on the proposed subdivision for your consideration:

GENERAL COMMENTS:

1. We note that there are several technical errors for the required signature blocks, which include the following: 1) the plan should reflect municipal and County review dates in the year 2000; 2) the County signature block should state that the plan has been reviewed, not approved, by the Chester County Planning Commission; and 3) the Chester County Recorder of Deeds Office is located in West Chester, not Norristown. These errors should be corrected by the applicant. The Township should not grant final plan approval until the applicant has submitted a plan that meets all municipal Ordinance requirements for a plan submission.

2. The zoning regulation notes on the plan states that the minimum lot width standard is 100 feet. Section 208-22A of the Township Zoning Ordinance states that the minimum lot width in the R-1 zoning district is 100 feet at the building line. This should be corrected.

DEPOSITION EXHIBIT
Janasik - 5
9-18-02 dt

ACCESS AND CIRCULATION:

3. We note that the proposed driveway for Lot 2 will have a slope of 14 percent. The Township Engineer should verify that this proposed driveway is in conformance with the Township Ordinances with regard to grade and sight distance.

4. We offer as a suggestion that the applicant should try to obtain permission to use the existing driveway to the east of the lot.

NATURAL FEATURES PROTECTION:

5. A portion of the site contains moderate to steep slopes which are proposed to be re graded. Slopes in excess of 25 percent should be protected by maintaining at least 80 percent of the area in undisturbed cover. Slopes of 15 to 25 percent should be protected by maintaining at least 70 percent of the area in undisturbed cover. For 8-15 percent slopes, erosion and sedimentation control plans for development should be carefully inspected to ensure that they control potential erosion on the site.

6. The plan and a 1995 aerial photograph indicate that a portion of the site is wooded. If development is to occur within the woodlands, the removal of trees should be limited to the minimum area needed for the dwelling and support facilities and the limit of tree removal should be shown on the plan. Any grading within the area of the dripline (the perimeter of the tree's branches) of the trees to be preserved increases the possibility of tree damage.

7. The Township Engineer should verify that the design and capacity of the proposed stormwater facilities conforms to ordinance provisions.

CRITICAL WATER AREA:

8. The subdivision is located within an area identified as a critical water area. The Township should verify that the proposed stormwater management measures are designed and installed to prevent degradation of the Township's groundwater resources.

LANDSCAPES:

9. The 1996 Chester County Comprehensive Plan, *Landscapes*, designates the area of the proposed subdivision as a Suburban Landscape. Suburban Landscapes include areas where infrastructure and public services have been, or should be, extended to accommodate residential development and shopping and employment centers. The Plan encourages design flexibility and a mix of density and uses, either through revitalization or infill, within the Suburban Landscape. This proposal is consistent with the guidelines for the Suburban Landscape.

ADMINISTRATIVE NOTE:

10. A minimum of four (4) copies of the plan should be presented at the Chester County Planning Commission for endorsement to permit recording of the final plan in accord with the procedures of Act 247, The Pennsylvania Municipalities Planning Code, and to meet the requirements of the Recorder of Deeds and the Assessment Office.

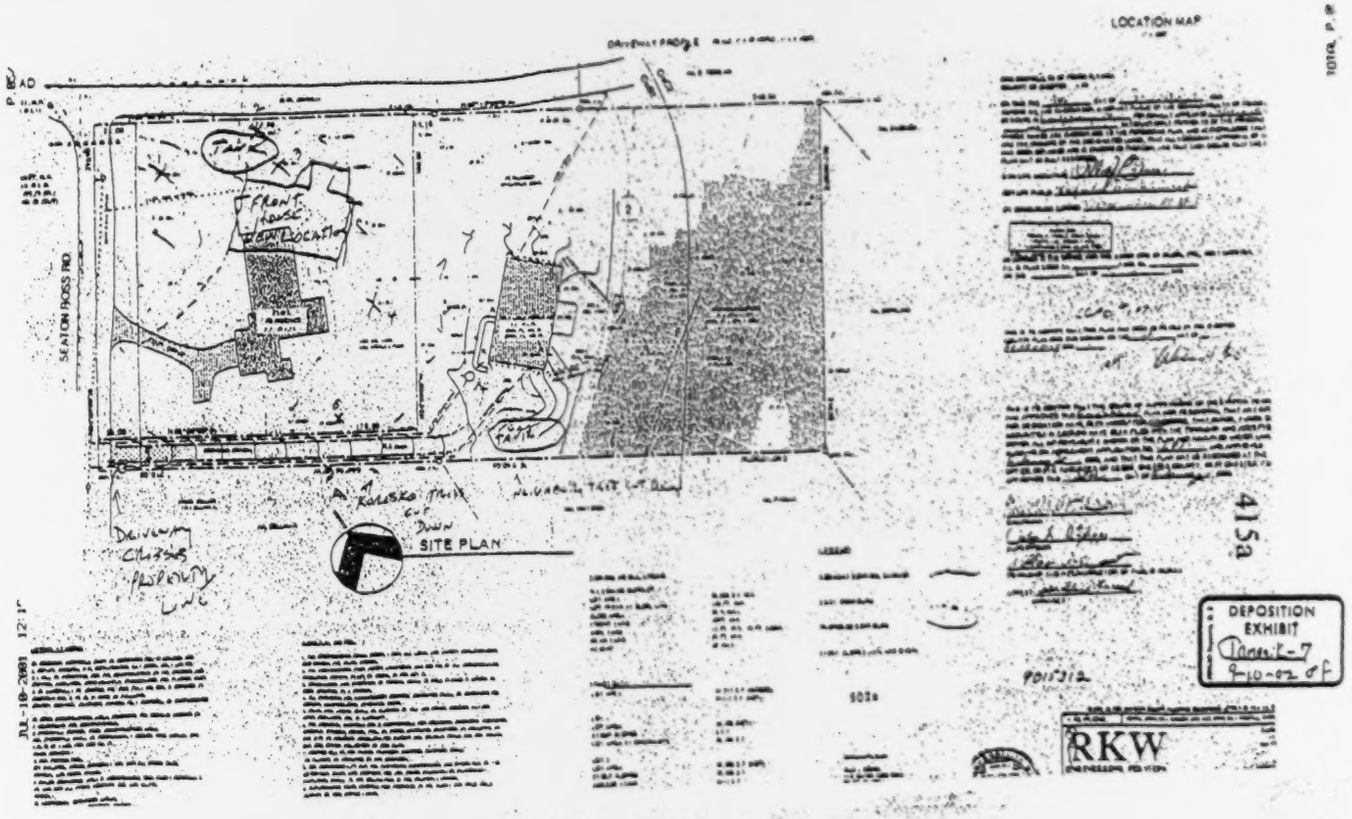
RECOMMENDATION: **The Commission recommends that the issues raised in this letter be addressed and all Township requirements be satisfied before action is taken on this plan.**

Sincerely,

William H. Fulton, AICP
Secretary

WHF/PF/kp

cc: Ollie J. Bower
RKW Engineering Services
Paul W. Olson, Board of Supervisors Chairman, Tredyffrin Township
Jeffrey C. May, Planning Commission Chairman, Tredyffrin Township
Terry Hone Woodman, Assistant Township Manager, Tredyffrin Township
Ronald Wagenmann, Manager, Upper Merion Township
Montgomery County Planning Commission


LOCATION MAP
SEATON PASS RD
SITE PLAN
DEPOSITION EXHIBIT
Isaacs-7
9-10-02
RKW

LAMB, WINDLE & McERLANE, P.C.
24 EAST MARKET STREET, BOX 565, WEST CHESTER, PA 19381-0565

William H. Lamb
Voice: (610) 430-8000
Fax: (610) 692-2405
wlamb@dlmcelaw.com

August 7, 2002

John J. Koresko, V, Esquire
Koresko & Associates
P.O. Box 60157
King of Prussia, PA 19406

Virginia I. Miller, Esquire
Anderson, Kill & Olick, P.C.
1600 Market Street, 32nd Floor
Philadelphia, PA 19103

Re: Koresko v. Mark Farley et al., CCCCP No. 01-53433

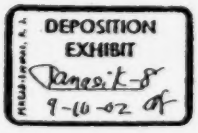
Dear Mr. Koresko and Ms. Miller:

Enclosed please find Tredryffrin Township's Answer to Plaintiffs' Amended Complaint, which was filed today.

Also enclosed you will find several cases which the Township believes support its position that the Plaintiffs have absolutely no claim against the Township. At best, the Plaintiffs have a simple trespass claim against Seaton Ross L.P. Dragging the Township into this matter and forcing it to expend money to defend the frivolous claims against the Township is an abuse of process. I now understand that you seek to take the depositions of two Township officials. I urge you to read the enclosed cases and to reconsider proceeding with this lawsuit against the Township.

As far as the propane tanks are concerned, I am still at a loss as to the Plaintiffs' standing to complain about the propriety or impropriety of propane tanks on a neighboring property. In any event, the Township took action to have any problems remedied. Accordingly, any claims that the Plaintiffs thought they had with regard to the propane tanks are now moot.

Should the Plaintiffs choose to proceed with this lawsuit against the Township, you are hereby notified that any and all remedies that the Township has against the Plaintiffs for engaging in a frivolous lawsuit and abuse of process, including those set forth under the Dragonetti statute, will be explored.



I look forward to hearing from you by next Wednesday, August 14, 2002. Otherwise, I will infer that you have rejected my request and the Township will proceed accordingly.

Very truly yours,

William H. Lamb

Enclosures
WHL/aes
cc: Scott E. Yaw, Esquire (w/encl)
Wayne W. Congar, Esquire (w/encl)
Vincent M. Pompo, Esquire
Susan C. Mangold, Esquire

LWM

418a

TREDYFFRIN TOWNSHIP

FA SCIMILIE MEMORANDUM

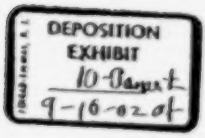
TO: Mark Farley
FAX: 610-520-9581
FROM: Emmy Baldassarre, Code Enforcement Officer
Phone 610-408-3614 Fax 610-993-9186
SUBJECT: Final Certificate of Occupancy Inspection, 1175 Seaton Ross Road
DATE: April 2, 2001
PAGES: 1

Please address the following and contact me for a reinspection to issue your Certificate of Occupancy

1. Install a mailbox at the driveway with the address
2. Hot water heater not turned on. No hot water in the house.
3. Door to hot water heater room impacts the water pipe upon opening
4. Extension on water heater pressure valve to within 6" of floor
5. Red cover plate required on heater shut off switch
6. Wires in electrical closet not connected?
7. Seal ceiling penetrations at vacuum pipes in basement closet
8. No evidence of screens. All openable windows require screens
9. Trap and water in laundry sink not connected
10. Roof shingles around skylight adjacent deck?
11. Front walk slate creates a tripping hazard
12. Installation of Air Conditioner?

DEPOSITION EXHIBIT
Jasunk-9
9-10-02 of

Street Address: 1175 Seaton Ross Rd.
General Contractor: Mark Farley
Owner/Tenant: Ollie Bower



From: Dennis Torres, Building Inspector
Subject: Initial plan review results
Date: 5.08.2000

A preliminary review has been made of the application package you have submitted. The following comments are made for your attention and/or correction.

A HVAC permit application package is required. Provide sizing calculations and contract.

A plumbing permit application package is required. Provide plumbing riser diagram and contract.

Act 222, Pennsylvania Energy Conservation Act, compliance is required.

The plans indicate several options are available. Indicate which options are to be constructed on this site.

Tempered glass shall be used in all hazardous locations per B-2405 and 16 CFR Part 1201.

Submit the manufacture's cut sheet for prefabricated fireplace.

The plans show a truss roof system (for garage) is to be employed. Submit a truss engineer's signed and sealed truss design and construction plan for the truss system for the township's review and approval.

Specify the method of damp proofing for the basement.

The ceiling of attached garages with living space above shall consist of a double layer of 5/8" type "X" gypsum wallboard. The joints shall be staggered.

No opening in the common wall between the attached garage and the living space shall be less than 4 inches above the finished floor level of the garage. This includes hvac openings.

Provide a level landing at the foot of the deck stair.

Builder to specify the manufacturer and brand of floor trusses to be used on the job. Floor trusses shall be listed by BOCA or NER or installation requirements and engineer's calculations shall be submitted.

Specify the method of damp proofing in for the basement.

Provide forms or sonotubes to enable a minimum of 2" protrusion of the concrete pier above

EXHIBIT N

BOARD OF SUPERVISORS
TREDYFFRIN TOWNSHIP
CHESTER COUNTY
1100 DuPortail Road
Berwyn, PA 19312
(610) 644-1400 FAX (610) 993-9186

Joseph A. Janesik
Township Manager

William H. Lamb
Solicitor

October 1, 1997

John J.V. and Bonnie J. Koresko V
1159 Seaton Ross Road
Wayne, PA 19087

Re Tax Parcel No. 43-7J-9
1159 Seaton Ross Road

Dear Mr. and Mrs. Koresko:

I am writing in regards the condition of the above referenced property in response to complaints the Township received from your neighbors including:

1. The basement window is open furnishing an entry way for rodents, small animals and children.

2. The pool cover may be torn exposing the pool water beneath.

3. The fence around the pool has fallen and serves no useful purpose.

Please contact me at 610-408-3614 to discuss the above matters.

Very truly yours,

Emeline K. Baldassarre
Code Enforcement Officer

Inspect Window Cover
and Side
Pool Fence 2-21-97-6300

Pending Applications for Fence

DEPOSITION EXHIBIT
Janesik-11
9-10-02 RT

facsimile
TRANSMITTAL

Name:	MARK FARLEY
Organization:	FARLEY DEVELOPMENT CO
Fax:	610-520-9501
Phone:	610-586-8800
From:	MICHAEL V. PILOTTI
Date:	07-05-02
Subject:	1175 & 1185 SEATON ROSS RD., PERMIT APPLICATION
Pages:	1

I'M CORRESPONDING TO YOU WITH THE RESULTS OF MY REVIEW OF YOUR APPLICATION SUBMITTED FOR UNDERGROUND TANK PLACEMENT FOR THE ABOVE REFERENCED PROPERTIES.
THE APPLICATIONS AS SUBMITTED ARE DENIED DUE TO SAID PLACEMENT WILL BE IN CONFLICT WITH TOWNSHIP ZONING REGULATIONS.
IT IS MY UNDERSTANDING THAT PROPANE TALKS HAVE BEEN INSTALL UNDERGROUND AT THE SAID PROPERTIES WITHOUT OBTAINING A REVIEW AND OR THE REQUIRED PERMITS TO DO SO. THEREFORE I HAVE NO CHOICE, GIVEN THE CIRCUMSTANCES THAN TO ORDER THE REMOVAL OF THE ILLEGAL TANKS IMMEDIATELY. SUBMIT A REVISED PLOT PLAN SUGGESTING A LOCATION THAT WILL COMPLY WITH SAID ZONING REGULATIONS ALONG WITH THE REQUIRED INSPECTION REQUEST FORM.
I STRONGLY RECOMMEND THAT THIS WORK BE DONE WITHOUT DELAY SO TO AVOID ANY FINES THAT COULD BE ISSUED UNDER THE TOWNSHIP CODE AND THE BUILDING CODE TO ALL PARTIES INVOLVED.
PLEASE CONTACT MY OFFICE ALONG WITH YOUR SUBCONTRACTOR SO THAT WE CAN ALL BE ON THE SAME PAGE TOWARD RESOLVE AND AVOID SUCH ACTION.
THANK YOU IN ADVANCE FOR YOUR PATIENCE AND COOPERATION WHILE UNDER ADVISEMENT IN THIS MATTER. I MAY BE REACHED AT 610-408-5612 DIRECTLY.

MICHAEL V. PILOTTI
BUILDING INSPECTOR
TREDYFFRIN TOWNSHIP

CC: Jack B. Tull
Joseph A. Janesik

F:\WPDATA\PILOTTI\FARLEY1175.wpd

DEPOSITION EXHIBIT
Janesik-12
7-10-02 DF

LAMB, WINDLE & McERLANE, P.C.
By: William H. Lamb, Esquire
Attorney I.D. #04927
By: Vincent M. Pompo, Esquire
Attorney I.D. #37714
By: Susan C. Mangold, Esquire
Attorney I.D. #78892
24 East Market Street, P.O. Box 565
West Chester, PA 19381
Telephone: (610) 430-9000

FILED
02 AUG -1 PM 4:17
OFFICE OF THE
PROTHONOTARY
CHESTER CO., PA.

JOHN J. KORESKO, V, et al.,	:	IN THE COURT OF COMMON PLEAS
Plaintiffs	:	CHESTER COUNTY, PENNSYLVANIA
v.	:	NO. 00-05343
MARK EARLEY, et al.,	:	
Defendants	:	

ANSWER OF DEFENDANT TOWNSHIP OF TREDYFFRIN TO PLAINTIFFS' AMENDED COMPLAINT IN EQUITY

Defendant, Township of Tredyffrin ("Tredyffrin" or "Township"), by and through its counsel, Lamb, Windle & McErlane, P.C., hereby answers Plaintiffs' Amended Complaint in Equity as follows.

1. Admitted.

2. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

DEPOSITION EXHIBIT
Tarnoff-13
9-10-02 DF

3. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

4. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

5. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

6. Denied as stated. Tredyffrin is a Home Rule Municipality. It specifically is denied that the Tredyffrin's supervisors, employees or agents took any actions that gave rise to any causes of action set forth in Plaintiffs' Amended Complaint. To the contrary, at all times relevant hereto, the actions of Tredyffrin were in compliance with the applicable ordinances.

7. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the

allegations in this paragraph and, consequently, said averments are denied.

8. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

9. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

10. Denied as stated. The Agreement of Sale relative to the 1175-1185 Property was between Defendant Ollie Bower and M.J Farley Development Co., Inc. and/or its assignees.

11. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

12. Admitted upon information and belief.

13. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied. By way of further answer, said subdivision plan was filed in compliance with the applicable ordinances.

14. Admitted in part, denied in part. It is admitted that no individualized notice of the filing of the subdivision plan was given. It specifically is denied that the Municipalities Planning Code ("MPC") or any other Township ordinance requires that notice of the filing of a subdivision plan be given to an adjoining landowner. Moreover, the subdivision approval process relative to the subject property was conducted at numerous advertised public meetings and, upon information and belief, Plaintiffs never participated in said meetings.

15. Admitted.

16. Denied as stated. It is admitted that Ollie Bower signed the subdivision plan. By way of further answer, the Township solicitor recorded the plan in the official records of Chester County.

17. Denied as the subdivision plan speaks for itself. By way of further answer, the subdivision plan shows a water line in the flagpole of the flag lot to connect to Seaton Ross Road.

18. Denied as the subdivision plan speaks for itself.

19. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

20. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

21. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

22. Denied as the subdivision plan speaks for itself. By way of further answer, it specifically is denied that the Municipalities Planning Code or any other Township ordinance

required the depiction of any trees beyond those shown on the subdivision plan.

23. Denied as Tredyffrin Code sections 181-39 and 181-43 speak for themselves.

24. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

25. Admitted.

26. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied. By way of further answer, the subdivision plan and building code speak for themselves.

27. Denied as stated. It is admitted Plaintiff sought to appeal the issuance of the building permit. It specifically is denied that there were any grounds for the Township to do so. By way of further answer, the subdivision approval process relative to the subject property was conducted at numerous advertised public

meetings and, upon information and belief, Plaintiffs never participated in said meetings.

28. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

29. Denied as the Application for Building Permit speaks for itself.

30. Denied as the Application for Use and Occupancy Permit speaks for itself.

31. It is admitted that Building Permit No. C 6519 was issued by Tredyffrin on May 31, 2000. Any characterizations of said permit specifically are denied as the permit speaks for itself.

32. Denied as the Residential Building Sanitary Sewer Construction Application speaks for itself.

33. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the

allegations in this paragraph and, consequently, said averments are denied.

34. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

35. Denied as the subdivision and building plans speak for themselves.

36. Denied as stated. At the time of the filing of this Complaint, installation of propane tanks at 1175 and 1185 Seaton Ross Road had been performed without the express permission of the Township. By way of further answer, any prior illegal installation of the propane tanks has since been remedied. Specifically, a permit was issued for the installation of a 500 gallon UG propane tank at 1195 Seaton Ross Road on or about July 11, 2002. A permit was issued for the installation of a 500 gallon UG propane tank at 1175 Seaton Ross Road on or about July 11, 2002. Copies of these permits are attached as Exhibit "A" hereto. Upon information and belief, the propane tanks as originally installed have since been removed and reinstalled in complete compliance with the MPC and Zoning Regulations.

37. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied. By way of further answer, upon information and belief, the installation of said propane tanks was done in compliance with the MPC and Zoning Regulations.

38. Denied for the reason that answering defendant does not know what Plaintiffs mean by "setback areas". By way of further answer, upon information and belief, the installation of the propane tanks was done in compliance with the MPC and Zoning Regulations.

39. Denied for the reasons set forth in paragraph 36, above.

40. Denied for the reason that answering defendant does not know what Plaintiffs mean by "subject residence". By way of further answer, upon information and belief, the installation of the propane tanks was done in compliance with the MPC and Zoning Regulations.

41. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the

allegations in this paragraph and, consequently, said averments are denied

42. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied. By way of further answer, there is nothing in any Township ordinance that prohibits the construction of a driveway or other grading as depicted on the subdivision plan. While there may be a private right of action in trespass, said right is not enforceable against the Township.

43. Denied. To the contrary, neither the Municipalities Planning Code nor any other Township ordinance requires the depiction of any trees beyond those shown on the subdivision plan.

44. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

45. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the

allegations in this paragraph and, consequently, said averments are denied.

46. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

47. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

48. Admitted upon information and belief.

49. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

50. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

51. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

52. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

53. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

54. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

55. Denied. To the contrary, permit no. 6456 for 1175 Seaton Ross Road, Wayne, Pennsylvania was issued on or about April 6, 2001 and permit no. 6492 for 1185 Seaton Ross Road, Wayne, Pennsylvania

was issued on or about June 25, 2001. The complaint in this matter was filed on or about June 25, 2001.

56. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

57. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

58. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

59. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

60. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

61. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

COUNT I

62. Defendant incorporates herein by reference its answers to paragraphs 1 through 61 of Plaintiffs' Amended Complaint, above, as though same were set forth herein at length.

63. Denied as stated. The subdivision plan speaks for itself. By way of further answer, it specifically is denied that the Municipalities Planning Code or any other Township ordinance required the depiction of any trees beyond those shown on the subdivision plan.

64. Admitted.

65. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

66. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

67. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

68. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied. By way of further action, the alleged damage contemplates a private cause of action in trespass, which cause of action is not enforceable against the Township.

69. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the

allegations in this paragraph and, consequently, said averments are denied.

70. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied. By way of further answer, any inference that there was in fact a prescriptive easement on the subject property specifically is denied.

71. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

72. Denied as a conclusion of law to which no response is required. By way of further answer, the applicable Township ordinances do not require that prescriptive dripline easements be noted on a subdivision plan.

WHEREFORE, Defendant Township of Tredyffrin respectfully requests that this Honorable Court enter judgment in its favor and against Plaintiffs.

LAW OFFICES • LAMB, WINDLE & McERLANE, P.C. • 24 EAST MARKET STREET • WEST CHESTER, PA 19381-0565

COUNT II

73. Defendant incorporates herein by reference its answers to paragraphs 1 through 72 of Plaintiffs' Amended Complaint, above, as though same were set forth herein at length.

74. Denied. To the contrary, the subdivision plan was filed in compliance with the applicable ordinances. By way of further answer, the applicable Township ordinances do not require that prescriptive dripline easements be noted on a subdivision plan.

75. Denied. To the contrary, the subdivision plan was filed in full compliance with the applicable ordinances. Further, it specifically is denied that the MPC or any other Township ordinance required the depiction of any trees other than those trees shown on the subdivision plan. By way of further answer, the applicable Township ordinances do not require that prescriptive dripline easements be noted on a subdivision plan.

76. Denied as the Subdivision Plan speaks for itself.

77. Denied as a conclusion of law to which no response is required. By way of further answer, the subdivision plan was filed in full compliance with the applicable ordinances.

78. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied.

79. Denied as a conclusion of law to which no response is required.

WHEREFORE, Defendant Township of Tredyffrin respectfully requests that this Honorable Court enter judgment in its favor and against Plaintiffs.

COUNT III

80. Defendant incorporates herein by reference its answers to paragraphs 1 through 79 of Plaintiffs' Amended Complaint, above, as though same were set forth herein at length.

81 Denied. To the contrary, the Township did not take any actions that have or will destroy unique assets of Plaintiffs. In fact, at all times relevant hereto, the Township acted in accordance with the applicable ordinances governing the subdivision of a property.

82. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied. By way of further answer, the alleged damage contemplates a private cause of action in trespass, which cause of action is not enforceable against the Township.

83. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied. By way of further answer, the alleged damage contemplates a private cause of action in trespass, which cause of action is not enforceable against the Township.

84. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied. By way of further answer, the alleged damage contemplates a private cause of action in trespass, which cause of action is not enforceable against the Township.

85. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are

denied. By way of further answer, the alleged damage contemplates a private cause of action in trespass, which cause of action is not enforceable against the Township.

86. After reasonable investigation, Defendant is without knowledge or information sufficient to form a belief as to the allegations in this paragraph and, consequently, said averments are denied. By way of further answer, the alleged damage contemplates a private cause of action in trespass, which cause of action is not enforceable against the Township.

87. Denied as stated. Upon information and belief, at the time of the filing of this Complaint, installation of propane tanks at 1175 and 1185 Seaton Ross Road had been performed without permits and without the express permission of the Township. By way of further answer, any prior illegal installation of the propane tanks has since been remedied. Specifically, a permit was issued for the installation of a 500 gallon UG propane tank at 1185 Seaton Ross Road on or about July 11, 2002. A permit was issued for the installation of a 500 gallon UG propane tank at 1175 Seaton Ross Road on or about July 11, 2002. See Exhibit "A". Upon information and belief, the propane tanks as originally installed have since been removed and reinstalled in complete compliance with the MPC and Zoning Regulations.

88. Denied as a conclusion of law to which no response is required. By way of further answer, the subdivision plan was filed in full compliance with the applicable ordinances. Moreover, the damages alleged in the Complaint contemplate a private cause of action in trespass, which cause of action is not enforceable against the Township.

89. Denied as a conclusion of law to which no response is required.

WHEREFORE, Defendant Township of Tredyffrin respectfully requests that this Honorable Court enter judgment in its favor and against Plaintiffs.

COUNT IV

90. Defendant incorporates herein by reference its answers to paragraphs 1 through 89 of Plaintiffs' Amended Complaint, above, as though same were set forth herein at length.

91. Denied as a conclusion of law to which no response is required. Moreover, the damages alleged in the Complaint contemplate a private cause of action in trespass, which cause of action is not enforceable against the Township.

92. Denied as a conclusion of law to which no response is required. Moreover, the damages alleged in the Complaint contemplate a private cause of action in trespass, which cause of action is not enforceable against the Township.

WHEREFORE, Defendant Township of Tredyffrin respectfully requests that this Honorable Court enter judgment in its favor and against Plaintiffs.

COUNT V

93. Defendant incorporates herein by reference its answers to paragraphs 1 through 92 of Plaintiffs' Amended Complaint, above, as though same were set forth herein at length.

94. Denied. It specifically is denied that the Township acte "in concert with" Defendant Farley or Bower or any other perso Said allegations are outrageous and unfounded. By way of furt answer, at most the damages alleged in the Complaint contempla private cause of action in trespass, which cause of action i enforceable against the Township.

95. Denied as a conclusion of law to which no resp required. By way of further answer, at most the damages al

the Complaint contemplate a private cause of action in trespass, which cause of action is not enforceable against the Township.

WHEREFORE, Defendant Township of Tredyffrin respectfully requests that this Honorable Court enter judgment in its favor and against Plaintiffs.

COUNT VI

96. Defendant incorporates herein by reference its answers to paragraphs 1 through 95 of Plaintiffs' Amended Complaint, above, as though same were set forth herein at length.

97. Denied as a conclusion of law to which no response is required.

98. Denied as a conclusion of law to which no response is required.

99. Denied as a conclusion of law to which no response is required.

100. Denied. It specifically is denied that the Township acted "in concert with" Defendant Farley or Bower or any other person. Said allegations are outrageous and unfounded. By way of further

105. If any cause of action exists relative to the facts set forth in Plaintiffs' Amended Complaint, said cause of action is a private cause of action, which is not enforceable against the Township.

106. In the event the Township and/or any of its co-defendants are found liable to Plaintiffs on any of the causes of action asserted in the Amended Complaint, the liability of the Township being expressly denied, the Township demands that its liability and that of its co-defendants be apportioned in accordance with the respective degree of fault of each defendant found liable.

107. Any liability on the part of the Township, which liability is expressly denied, is secondary and passive, whereas the liability of other parties or individuals is primary and direct.

108. At all times relevant, the Township performed each and every duty, if any, owed to Plaintiffs.

109. Plaintiffs have failed to state a claim against the Township upon which relief may be granted.

110. The Township owed no duty to Plaintiffs.

111. At all relevant times, the Township conformed and complied fully with all applicable laws and Township ordinances pertinent to the matters alleged.

112. Plaintiffs' claims are barred by their failure to conduct a reasonable investigation of the facts and circumstances alleged in the Complaint.

113. Plaintiffs' claims are barred or limited by the applicable statute of limitations.

114. Plaintiffs' claims are barred by the doctrine of laches.

115. Plaintiffs' claims are barred by the doctrine of equitable estoppel.

116. Plaintiffs' claims are barred by waiver and consent.

117. Plaintiffs' Amended Complaint fails to state a claim upon which relief can be granted.

118. Plaintiffs' claims are barred by the doctrine of ratification.

119. Plaintiffs' claims are barred by the doctrine of accord and satisfaction.

120. Plaintiffs' claims are barred by the doctrine of justification.

121. Plaintiffs' claims are barred in whole or in part by reason of its failure to mitigate damages, if any.

122. Plaintiffs have not sustained any damages.

123. Plaintiffs' claims are barred by the Statute of Frauds.

124. Answering Defendant hereby incorporates by reference as though set forth at length herein all of the beneficial defenses, affirmative defenses and new matter averred in each and every of the answering pleadings filed by all co-defendants.

WHEREFORE, Defendant Township of Tredyffrin respectfully requests that this Honorable Court enter judgment in its favor and against Plaintiffs.

NEW MATTER IN THE NATURE OF CROSSCLAIMS DIRECTED TO DEFENDANTS MARK FARLEY, OLLIE BOWER, BRYN MAWR CUSTOM HOME, INC. AND SEATON ROSS, L.P., PURSUANT TO PA.R.C.P. 2252(D)

CROSSCLAIM FOR COMMON LAW INDEMNIFICATION

125. The Township believes and therefore avers that if the allegations in Plaintiffs' Amended Complaint are proven to be true at trial, such allegations being expressly denied, then one or more of the other Defendants are liable over to the Township on Plaintiffs' causes of action sued upon in the Complaint.

WHEREFORE, Defendant Township of Tredyffrin seeks common law indemnification against Mark Farley, Ollie Bower, Bryn Mawr Custom Home, Inc., and Seaton Ross, L.P., for any judgment rendered in favor of Plaintiffs, together with costs and counsel fees.

CROSSCLAIM FOR CONTRIBUTION

126. The Township believes and therefore avers that if the allegations in Plaintiffs' Amended Complaint are proven to be true at trial, such allegations being expressly denied, then one or more of the other Defendants are wholly liable on Plaintiffs' causes of action sued upon in the Amended Complaint.

127. The Township believes and therefore avers that if the allegations in Plaintiffs' Amended Complaint are proven to be true at trial, such allegations being expressly denied, then one or more of the other Defendants are jointly and/or severally liable with the Township on Plaintiffs' causes of action sued upon in the Amended Complaint.

WHEREFORE, Defendant Township of Tredyffrin seeks contribution from Mark Farley, Ollie Bower, Bryn Mawr Custom Home, Inc., and Seaton Ross, L.P., for any judgment rendered in favor of Plaintiffs, together with costs and counsel fees.

Respectfully submitted,

LAMB, WINDLE & McERLANE, P.C.

Date: August 7, 2002

By: Susan C. Mangold

William H. Lamb, Esquire
Vincent T. Pompo, Esquire
Susan C. Mangold Esquire

LAW OFFICES • LAMB, WINDLE & McERLANE, P.C. • 24 EAST MARKET STREET • WEST CHESTER, PA. 19381-0565

EXHIBIT "A"

BEST AVAILABLE COPY

Letter SWTF

BUILDING PERMIT

Office 451a

Expire

NOTICE

Core excavations and driveway installations must comply with requirements of the Township Engineer or Director of Public Works before installed

SUPERVISORS OF TREDYFFRIN TOWNSHIP
100 Dorchester Road
BERWYN PA 19312

Conditions of occupancy are noted for all Buildings

Receipt No	Date	Tax Map Number	Zoning District	Date issued	Permit No
32317	5/17/02	43-03-8.1	R-1	5 / 31 / 02	C8962

Scully Propane Service
Name

Oak Avenue & B&O R.R., Collingdale, PA 19023
(Address)

Permit for installation of 500 gallon UG Propane tank, per plan.

Comply with BOCA NMC/93 and NFPA 58

location: 1175 Seaton Ross Road Radnor PA 19087

In accordance with application No 02-1471 and plan No on file filed with the Build

Inspector, subject to the provisions of the Township Ordinances

NOTICE

This permit does not relate to plumbing or as connections with the sanitary sewer system nor does it cover work on highways or the storage of materials thereon. Separate permits must be obtained immediately for existing installations and connections to sanitary sewer system.

Received fee of one hundred seventy-five & 00/100 DOLLARS($ 175.00)

Secretary MG

VOID IF ACTIVE WORK IS NOT COMMENCED WITHIN SIX MONTHS FROM DATE OF ISSUE

Est. Cost $ 1,775.00 Owner M. J. Farley Development Company

452a

Office of the

Expire 2/15/03

SUPERVISORS OF TREDYFFRIN TOWNSHIP
1100 Duportail Road
BERWYN, PA 19312

Certificates of occupancy are required for all buildings

Date	Tax Map Number	Zoning District	Date issued	Permit No.
1/02	43-7J-8	R-1	2 / 11 / 02	C8963

Oak Avenue & B&O R.R., Collingdale, PA 19023
(Address)

500 gallon UG Propane tank, per plan.

OCA NMC/95 and NFPA 58.

Seaton Ross Road Radnor PA 19087

ation No. 02-1470 and plan No. on file filed with the Building

provisions of the Township Ordinances

mbing or its connec- Received fee of one hundred seventy-five & 00/100 DOLLARS($ 175.00)
tem not does it cover
s of materials thereon
ined immediately for
done to sanitary sewer Secretary MG

E WORK IS NOT COMMENCED WITHIN SIX MONTHS FROM DATE OF ISSUE

Est. Cost $ 1,775.00 Owner M. J. Farley Development Company

VERIFICATION

I, Joseph A. Janasik, verify and affirm that the statements made in the foregoing are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S.A. § 4904 relating to unsworn falsification to authorities.

Joseph A. Janasik, Secretary/Manager
Tredyffrin Township

JOHN J. KORESKO, V, et al., : IN THE COURT OF COMMON PLEAS

Plaintiffs : CHESTER COUNTY, PENNSYLVANIA

v. : NO. 00-05343

MARK FARLEY, et al., :

Defendants. :

FILED
'02 AUG -7 PM 4:11
OFFICE OF THE
PROTHONOTARY
CHESTER CO., PA.

CERTIFICATE OF SERVICE

This is to certify that in this case, complete copies of the foregoing have been served upon the following persons, by the following means and on the date(s) stated:

Name:	Means of Service:	Date of Service:
John J. Koresko, V, Esquire Koresko & Associates, P.C. P.O. Box 60157 King of Prussia, PA 19406	First Class Mail	August 7, 2002
Virginia I. Miller, Esquire Anderson, Kill & Olick, P.C. 1600 Market Street, 32nd Floor Philadelphia, PA 19103	First Class Mail	August 7, 2002
Wayne W. Congar, Esquire Wayne W. Congar & Associates 1548 McDaniel Drive West Chester, PA 19380	First Class Mail	August 7, 2002
Scott E. Yaw, Esquire Lentz, Cantor & Massey, Ltd. 20 Mystic Lane Chester County Commons Malvern, PA 19355-1942	First Class Mail	August 7, 2002

LAMB, WINDLE & McERLANE, P.C.

By: Susan C. Mangold

William H. Lamb, Esquire #04927
Vincent M. Pompo, Esquire #37714
Susan C. Mangold Esquire #78892
24 East Market Street
West Chester, PA 19380
(610) 430-8000

Exhibits to Appendix J

Office of the

NOTICE

Cuts, excavations and obstructions must comply with regulations, obtain Township Engineer or Director of Public Works before backfilling

SUPERVISORS OF TREDYFFRIN TOWNSHIP
1100 Duportail Road
BERWYN, PA. 19312

Certificates of occupancy are required for all Buildings

Receipt No.	Date	Tax Map Number	Zoning District	Date Issued	Permit No.
32317	5/17/02	43-7H-8	R-1	/ /	C8952

Scully Propane Service (Name) Oak Avenue & B&O R.R., Collingdale, PA 19023 (Address)

Permit for installation of 500 gallon UG Propane tank, per plan. *

Comply with BOCA NMC/93 and NFPA 58.

location: 1185 Seaton Ross Road Radnor PA 19087

in accordance with application No 02-1470 and plan No. on file filed with the Building Inspector, subject to the provisions of the Township Ordinances

NOTICE

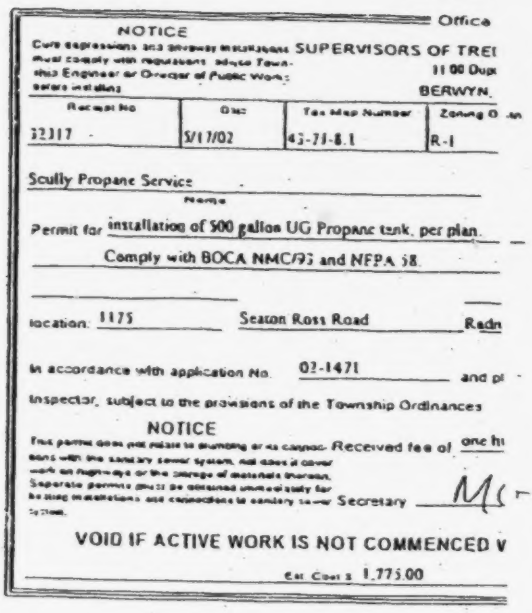
This permit does not relate to plumbing or the connection with the sanitary sewer system, nor does it cover work on highways or the storage of materials thereon. Separate permits must be obtained immediately for sewer installations and connections to sanitary sewer system.

Received fee of one hundred seventy-five & 00/100 DOLLARS($ 175.00)

Secretary MAG

VOID IF ACTIVE WORK IS NOT COMMENCED WITHIN SIX MONTHS FROM DATE OF ISSUE

Est. Cost $ 1,775.00 Owner M. J. Farley Development Company



Office

NOTICE

Curb depressions and driveway installations SUPERVISORS OF TREI must comply with regulations, advise Town- 11 00 Dupl
ship Engineer or Director of Public Works BERWYN,
before installing

Receipt No.	Date	Tax Map Number	Zoning D
32317	5/17/02	43-7J-8.1	R-1

Scully Propane Service
Name

Permit for installation of 500 gallon UG Propane tank, per plan.

Comply with BOCA NMC/93 and NFPA 58.

location: 1175 Seaton Ross Road Radn

in accordance with application No. 02-1471 and pl

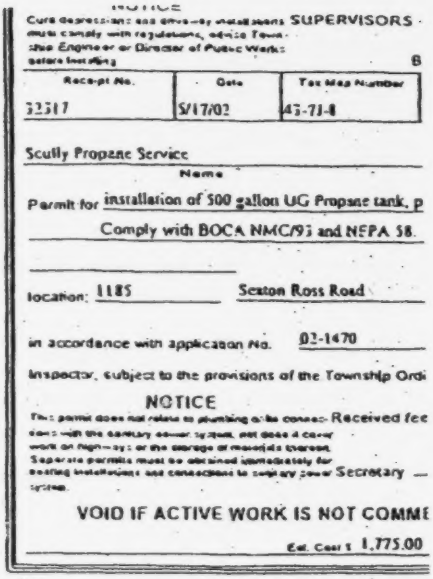
Inspector, subject to the provisions of the Township Ordinances

NOTICE

This permit does not relate to plumbing or its connec- Received fee of one hi
tions with the sanitary sewer system, nor does it cover
work on highways or the storage of materials thereon.
Separate permits must be obtained immediately for
existing installations and connections to sanitary sewer Secretary MC
system.

VOID IF ACTIVE WORK IS NOT COMMENCED V

Est. Cost $ 1,775.00



NOTICE

Curb depressions and driveway installations SUPERVISORS
must comply with regulations, advise Town-
ship Engineer or Director of Public Works
before installing B

Receipt No.	Date	Tax Map Number
32317	5/17/02	43-7J-8

Scully Propane Service
Name

Permit for installation of 500 gallon UG Propane tank, p

Comply with BOCA NMC/93 and NFPA 58.

location: 1185 Seaton Ross Road

in accordance with application No. 02-1470

Inspector, subject to the provisions of the Township Ordi

NOTICE

This permit does not relate to plumbing or its connec- Received fee
tions with the sanitary sewer system, nor does it cover
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existing installations and connections to sanitary sewer Secretary
system.

VOID IF ACTIVE WORK IS NOT COMME

Est. Cost $ 1,775.00

Exhibits to Appendix L

Since growth rates may vary according to soil fertility and availability of moisture, the growth rates for the Koresko trees were established by taking increment core wood samples from the trunks of Norway Maple #3 and White Oak #11. An increment core extracts a ¼ inch diameter wood sample from the tree trunk allowing examination of the wood and annual tree growth rings. It was determined that the Norway Maple grew 5 inches in 41 years or an average growth rate of 8.2 years per inch of trunk radius. It was determined that the White Oak grew 8 inches in 98 years or an average growth rate of 12 years per inch. Since increment cores are an invasive procedure, not all the trees were sampled. The growth rates from the sampled tree were used to estimate the age of all the other trees in question.

In scientific studies, Dr. Gary Watson of the Morton Arboretum established that tree roots can be expected to extend an average length of 18 inches per year in our latitude and climate. By dividing the distance each tree grew from the property line and dividing by 1.5 feet, the number of years until the roots crossed the property line can be estimated.

The following chart contains the calculations for each tree. Note that the roots of all the trees inventoried both crossed the property line and had crossed the line for more than 21 years

Inv. No.	Tree Name	Tree Circ.	Tree Diameter	Growth Rate	Estimated Age	Distance from Property Line	Years until roots cross Property Line	No. of years since roots crossed property line
1	Black Gum	48	15.3	8.2	62.6	4.25	2.8	59.8
2	Norway Maple	63	20.1	8.2	82.2	12.5	8.3	73.9
3	Norway Maple	40	12.7	8.2	52.2	4	2.7	49.5
4	Sassafras	43	13.7	8.2	56.1	8	5.3	50.8
5	Black Gum	36	11.5	8.2	47.0	3.5	2.3	44.6
6	White Oak	67	21.3	12	128.0	2.75	1.8	126.1
7	Hickory	44	14.0	8.2	57.4	1.6	1.1	56.4
8	Norway Maple	34	10.8	8.2	44.4	9.75	6.5	37.9
9	Norway Maple	26	8.3	8.2	33.9	3.5	2.3	31.6
10	Norway Maple	29	9.2	8.2	37.8	7.75	5.2	32.7
11	White Oak	66	21.0	12	126.1	12.75	8.5	117.6
12	Stump	22	7.0	8.2	28.7	0.5	0.3	28.4
13	Stump	?	?	?	?	?	?	?

Chart #2: Tree Age and Critical Calculations

These estimates clearly show that the trees had grown on the neighbor's property for more than the 21 years required to establish an easement. Because of the shallow far-reaching growth patterns of tree roots, there can be no doubt that the excavation for the driveway severed a significant amount of roots. In this regard, Tree preservation best management practices were disregarded by Tredyferin Township by their approval of the subdivision plan. Furthermore, the builder/developer also disregarded these tree protection guidelines. Trees whose roots are severed usually show little symptoms for a period of two or more

years. It is inevitable that these trees will decline and that many will die as a result of the excavation of the driveway and utility trench.

Not only did the tree roots establish an easement right, but most of the same trees extended branches over the property line for more than 21 years.

Inv. No.	Tree Name	Dist/Property L in Ft.	Dist. Dripline	Yrs till cross P.L. 4"/yr	Yrs since cross P.L. 4"/yr
1	Black Gum	4.25	13	12.8	26.3
2	Norway Maple	12.5	31	37.5	55.6
3	Norway Maple	4	30	12.0	78.1
4	Sassafras	8	14	24.0	18.0
5	Black Gum	3.5	21	10.5	52.6
6	White Oak	2.75	24	8.3	63.8
7	Hickory	1.5	11	4.5	28.5
8	Norway Maple	9.75	18	29.3	24.8
9	Norway Maple	3.5	20	10.5	49.5
10	Norway Maple	7.75	14	23.3	18.8
11	White Oak	12.75	28	38.3	45.8
12	Stump	.5	?	1.5	?
13	Stump	?	?	?	?

Chart #3: Branch Growth and Easement Establishment

Value of Loss Calculations:

Since the trees on the Koresko's property suffered damage because the tree preservation best management practices were not observed, Mr. Koresko wishes to be compensated for the value of his loss and to protect his tree and others from future damage. The appropriate value loss appraisal concept is the repair of the damaged property. With smaller trees, replacement of the damaged trees restores or repairs the property to the pre-existing condition. The trees involved with this damage are larger than can be replaced by purchase and planting from local and regional nursery sources.

Trunk Formula Method: Value of loss therefore must be derived from market condition. One way frequently used to calculate tree value for those trees larger than can easily be replaced is called the trunk formula method. The Council of Tree and Landscape Appraisers (CTLA) describes the trunk formula method in the ninth edition of the Guide for Tree and Landscape Appraisal. The CTLA council is represented by five green industry professional organizations. Calculation of the tree value begins with the cost to purchase and plant a 4-inch tree replacement. This replacement costs is used to calculate the dollar per square inch of the replacement tree's trunk cross section. This dollar per square inch value is then used to derive the value of the larger tree. Tree condition, landscape location, and species value are rated and used to adjust the final appraised value.

Using this trunk formula method, the total calculated value for the total loss of all 11 trees and 2 stumps is $44,406.41. Since Sassafras trees are difficult to transplant and are difficult or impossible to find from nursery sources. I substituted Norway Maple for

purposes of calculating the value of loss because Norway Maple is modest in price, readily available, and already exists in the landscape. The wood from stump #12 resembles Norway Maple; I calculated the value of loss for this tree using Norway Maple pricing. Stump #13 was never located but has some value. I assumed that it was a Norway Maple the same size and condition as Stump #12.

Compounding Costs for Replacement Plants: This method calculates investment return should the costs of the replacement plants be invested for the number of years required to grow the tree back to the same size. The following chart shows the calculations.

Inv. No.	Tree Name	Tree Age	No. yrs at planting	No. of Yrs to Grow Replace-ment	Value of Replace-ment Tree	Investment Costs (Compounded Interest at 3%)	Investment Costs (Compounded Interest at 4%)	Investment Costs (Compounded Interest at 5%)
1	Black Gum	62.6	10	52.6	$ 987.50	$ 4,674.93	$ 7,771.25	$ 12,855.66
2	Norway Maple	82.2	10	72.2	$ 1,450.00	$ 12,252.24	$ 24,613.60	$ 49,117.40
3	Norway Maple	52.2	10	42.2	$ 1,450.00	$ 5,047.76	$ 7,588.83	$ 11,364.66
4	Sassafras	56.1	10	46.1	$ 1,450.00	$ 5,664.53	$ 8,843.11	$ 13,746.58
5	Black Gum	47	10	37	$ 987.50	$ 2,947.91	$ 4,214.74	$ 6,005.39
6	White Oak	128	10	118	$ 462.50	$ 15,132.28	$ 47,320.11	$ 146,368.97
7	Hickory	57.4	10	47.4	$ 2,125.00	$ 8,626.67	$ 13,637.64	$ 21,465.04
8	Norway Maple	44.4	10	34.4	$ 1,450.00	$ 4,008.38	$ 5,588.75	$ 7,767.48
9	Norway Maple	33.9	10	23.9	$ 1,450.00	$ 2,938.85	$ 3,702.24	$ 4,653.63
10	Norway Maple	37.8	10	27.8	$ 1,450.00	$ 3,297.94	$ 4,314.15	$ 5,628.99
11	White Oak	126	10	116.1	$ 462.50	$ 14,305.85	$ 43,922.03	$ 133,410.30
12	Stump	28.7	10	18.7	$ 1,450.00	$ 2,520.14	$ 3,019.20	$ 3,610.84
13	Stump	28.7	10	18.7	$ 1,450.00	$ 2,520.14	$ 3,019.20	$ 3,610.84
				Value of Replacement Trees:	$ 16,625.00			
					Investment to Grow Replacement Trees using Compounded Interest:	$ 83,937.62	$ 177,554.84	$ 419,605.78

Chart #4: Compounded Cost for Replacement Trees

Site Clean-up Costs

In addition to the appraised value of the large trees, the death of existing trees necessitates the removal of the tree and stump. These calculations assume that access can only be gained from the Koresko's property.

This estimate is based on my own experience and corroborated by productivity figures established for removing trees and stumps in Toledo, Ohio. These productivity figures are published in the International Society of Arboriculture's *Journal of Arboriculture* [18(6) November 1992] in an article entitled "Performance Standards for Municipal Tree Maintenance" by Patrick R. O'Brien, Kenneth A. Joehlin and Daniel J. O'Brien. It was found in this study that the diameter class of the tree was positively correlated to the labor

hours required for its remov... ...lowing tree removal cost chart shows the assigned diameter class based on this study of each tree at issue on the Koresko property

Inv. No.	Tree Name	Trunk Diameter	Diameter Class	Tree Removal Hrs/tree	@$65/hr.
1	Black Gum	15.3	12.6" - 18.5"	3.94	$ 256.10
2	Norway Maple	20.1	18.6" - 24.5	5.39	$ 350.35
3	Norway Maple	12.7	12.6" - 18.5"	3.94	$ 256.10
4	Sassafras	13.7	12.6" - 18.5"	3.94	$ 256.10
5	Black Gum	11.5	6.6" - 12.5"	1.83	$ 118.95
6	White Oak	21.3	18.6" - 24.5	5.39	$ 350.35
7	Hickory	14	12.6" - 18.5"	3.94	$ 256.10
8	Norway Maple	10.8	6.6" - 12.5"	1.83	$ 118.95
9	Norway Maple	8.3	6.6" - 12.5"	1.83	$ 118.95
10	Norway Maple	9.2	6.6" - 12.5"	1.83	$ 118.95
11	White Oak	21	18.6" - 24.5	5.39	$ 350.35
12	Stump	7	n/a	n/a	n/a
13	Stump	?	n/a	n/a	n/a
			Total Hrs.:	39.25	$2,551.25

Chart #5: Tree Removal Cost Calculations – (*Toledo Study*)

The productivity figures for the Toledo study were based on use of a bucket truck and log loading equipment. Since access to these trees is only from the Koresko's property and access for equipment to the site is limited without collateral site damage, the price can easily be three times the Toledo study's costs. This would bring the cost of removing the remaining trees to: $2,551.25 X 3 = $7,653.75

The removal of the stumps and debris and filling the holes with topsoil are additional costs. The Toledo study calculated the labor hours to grind and remove tree stump debris as presented in Chart #6.

Inv. No.	Tree Name	Trunk Diameter	Diameter Class	Stump Removal Hrs/tree	@$65/hr.
1	Black Gum	15.3	12.6" - 18.5"	1.77	$ 115.05
2	Norway Maple	20.1	18.6" - 24.5	2.46	$ 159.90
3	Norway Maple	12.7	12.6" - 18.5"	1.77	$ 115.05
4	Sassafras	13.7	12.6" - 18.5"	1.77	$ 115.05
5	Black Gum	11.5	6.6" - 12.5"	1.26	$ 81.90
6	White Oak	21.3	18.6" - 24.5	2.46	$ 159.90
7	Hickory	14	12.6" - 18.5"	1.77	$ 115.05
8	Norway Maple	10.8	6.6" - 12.5"	1.26	$ 81.90
9	Norway Maple	8.3	6.6" - 12.5"	1.26	$ 81.90
10	Norway Maple	9.2	6.6" - 12.5"	1.26	$ 81.90
11	White Oak	21	18.6" - 24.5	2.46	$ 159.90
12	Stump	7	6" - 8.3	0.84	$ 54.60
13	Stump	?(7)	6" - 8.3	0.84	$ 54.60
			Total Hrs.:	21.18	$1,376.70

Chart #6: Stump Removal Cost Calculations

The Toledo stumps are conveniently adjacent to a road surface with ready access for trucks and equipment. The cost to remove stumps and restore the site could easily be 3 times the Toledo study costs or 3 X 1,376.70 = **$4,130.10**. This would bring the total for tree removal costs to $7,653.75 + $4,130.10 = **$11,783.85**.

Certification:

I certify that I am an ISA Certified Arborist (PD-006) and an ASCA Registered Consulting Arborist. The methods and opinions expressed in this report are my own, based on a reasonable degree of scientific certainty and in accordance with current arboriculture industry standards. These opinions are primarily based on my own investigation of relevant facts. Facts given by others about the events of the accident are assumed to be correct. I reserve the right to amend or supplement this report in the future based on new information or evidence.

Andrew William Graham, Jr. — September 26, 2002

Andrew William Graham, Jr.
ASCA Registered Consultant Arborist

Date:

American Society of Consulting Arborists * No. 343 *

Exhibits to Appendix M

THE COUNTY OF CHESTER

COMMISSIONERS:
Karen L. Marrynick, Chairman
Colin A. Hanna
Andrew E. Dinniman

WILLIAM H. FULTON, AICP
Executive Director

PLANNING COMMISSION
Government Services Center, Suite 270
601 Westtown Road
P.O. Box 2747
West Chester, PA 19380-0990
610-344-6285
FAX 610-344-6515

DEPOSITION EXHIBIT
Bower-1
9-6-02 JPH

February 16, 2000

Joseph A. Janasik, Secretary/Manager
Tredyffrin Township
1100 Duportail Road
Berwyn, PA 19312

Re: Final Subdivision – 1185 Seaton Ross Road (Ollie J. Bower)
10701 – Tredyffrin Township

Dear Mr. Janasik:

A final subdivision plan entitled "1185 Seaton Ross Road", prepared by RKW Engineering Services, dated October 11, 1999 and last revised December 9, 1999, was received by this office on January 21, 2000. The subdivision is situated on the east side of Seaton Road south of Hobbs Road and involves the creation of a 1.34 acre parcel (Lot 2) from the existing 2.24 acre parent tract (tax parcel 43-7I-8). There is an existing residence on Lot 1 (0.77 acres). The lots will be served by public water and sewer. The project site is located in the R-1 Residence zoning district. We note that a portion of this site adjoins Upper Merion Township in Montgomery County to the north.

This plan is reviewed by the Chester County Planning Commission in accord with the provisions of Section 502 of the Pennsylvania Municipalities Planning Code (MPC). This report does not review the plan for compliance to all aspects of your ordinance, as this is more appropriately done by agents of the Township. We offer the following comments on the proposed subdivision for your consideration:

GENERAL COMMENTS:

1. We note that there are several technical errors for the required signature blocks, which include the following: 1) the plan should reflect municipal and County review dates in the year 2000; 2) the County signature block should state that the plan has been reviewed, not approved, by the Chester County Planning Commission; and 3) the Chester County Recorder of Deeds Office is located in West Chester, not Norristown. These errors should be corrected by the applicant. The Township should not grant final plan approval until the applicant has submitted a plan that meets all municipal Ordinance requirements for a plan submission.

2. The zoning regulation notes on the plan states that the minimum lot width standard is 100 feet. Section 208-22A of the Township Zoning Ordinance states that the minimum lot width in the R-1 zoning district is 100 feet at the building line. This should be corrected.

ACCESS AND CIRCULATION:

3. We note that the proposed driveway for Lot 2 will have a slope of 14 percent. The Township Engineer should verify that this proposed driveway is in conformance with the Township Ordinances with regard to grade and sight distance.

4. We offer as a suggestion that the applicant should try to obtain permission to use the existing driveway to the east of the lot.

NATURAL FEATURES PROTECTION:

5. A portion of the site contains moderate to steep slopes which are proposed to be re graded. Slopes in excess of 25 percent should be protected by maintaining at least 80 percent of the area in undisturbed cover. Slopes of 15 to 25 percent should be protected by maintaining at least 70 percent of the area in undisturbed cover. For 8-15 percent slopes, erosion and sedimentation control plans for development should be carefully inspected to ensure that they control potential erosion on the site.

6. The plan and a 1995 aerial photograph indicate that a portion of the site is wooded. If development is to occur within the woodlands, the removal of trees should be limited to the minimum area needed for the dwelling and support facilities and the limit of tree removal should be shown on the plan. Any grading within the area of the dripline (the perimeter of the tree's branches) of the trees to be preserved increases the possibility of tree damage.

7. The Township Engineer should verify that the design and capacity of the proposed stormwater facilities conforms to ordinance provisions.

CRITICAL WATER AREA:

8. The subdivision is located within an area identified as a critical water area. The Township should verify that the proposed stormwater management measures are designed and installed to prevent degradation of the Township's groundwater resources.

LANDSCAPES:

9. The 1996 Chester County Comprehensive Plan, *Landscapes*, designates the area of the proposed subdivision as a Suburban Landscape. Suburban Landscapes include areas where infrastructure and public services have been, or should be, extended to accommodate residential development and shopping and employment centers. The Plan encourages design flexibility and a mix of density and uses, either through revitalization or infill, within the Suburban Landscape. This proposal is consistent with the guidelines for the Suburban Landscape.

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ADMINISTRATIVE NOTE:

10. A minimum of four (4) copies of the plan should be presented at the Chester County Planning Commission for endorsement to permit recording of the final plan in accord with the procedures of Act 247, The Pennsylvania Municipalities Planning Code, and to meet the requirements of the Recorder of Deeds and the Assessment Office.

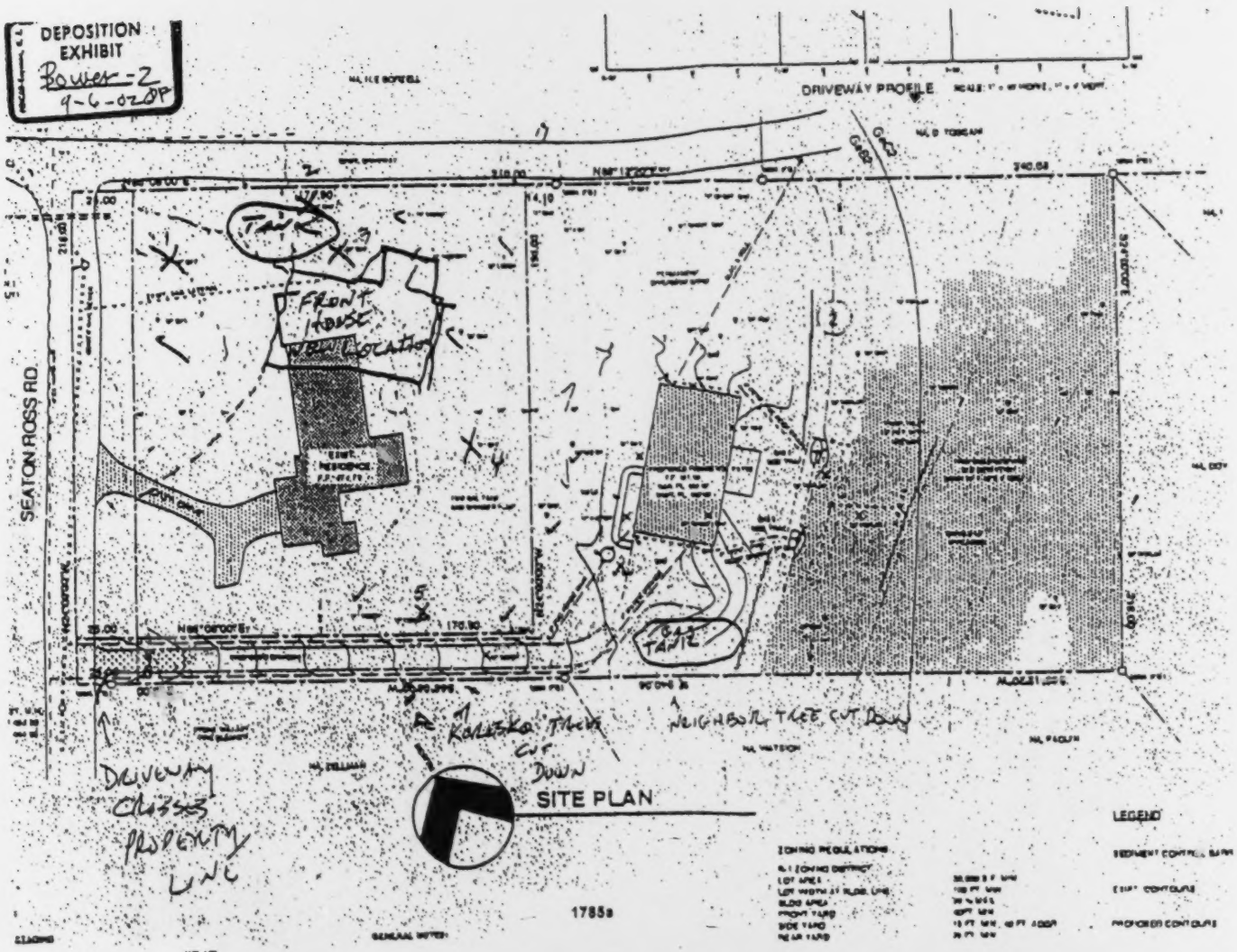
RECOMMENDATION: The Commission recommends that the issues raised in this letter be addressed and all Township requirements be satisfied before action is taken on this plan.

Sincerely,

William H. Fulton, AICP
Secretary

WHF/PF/kp

cc: Ollie J. Bower
RKW Engineering Services
Paul W. Olson, Board of Supervisors Chairman, Tredyffrin Township
Jeffrey C. May, Planning Commission Chairman, Tredyffrin Township
Terry Flone Woodman, Assistant Township Manager, Tredyffrin Township
Ronald Wagenmann, Manager, Upper Merion Township
Montgomery County Planning Commission



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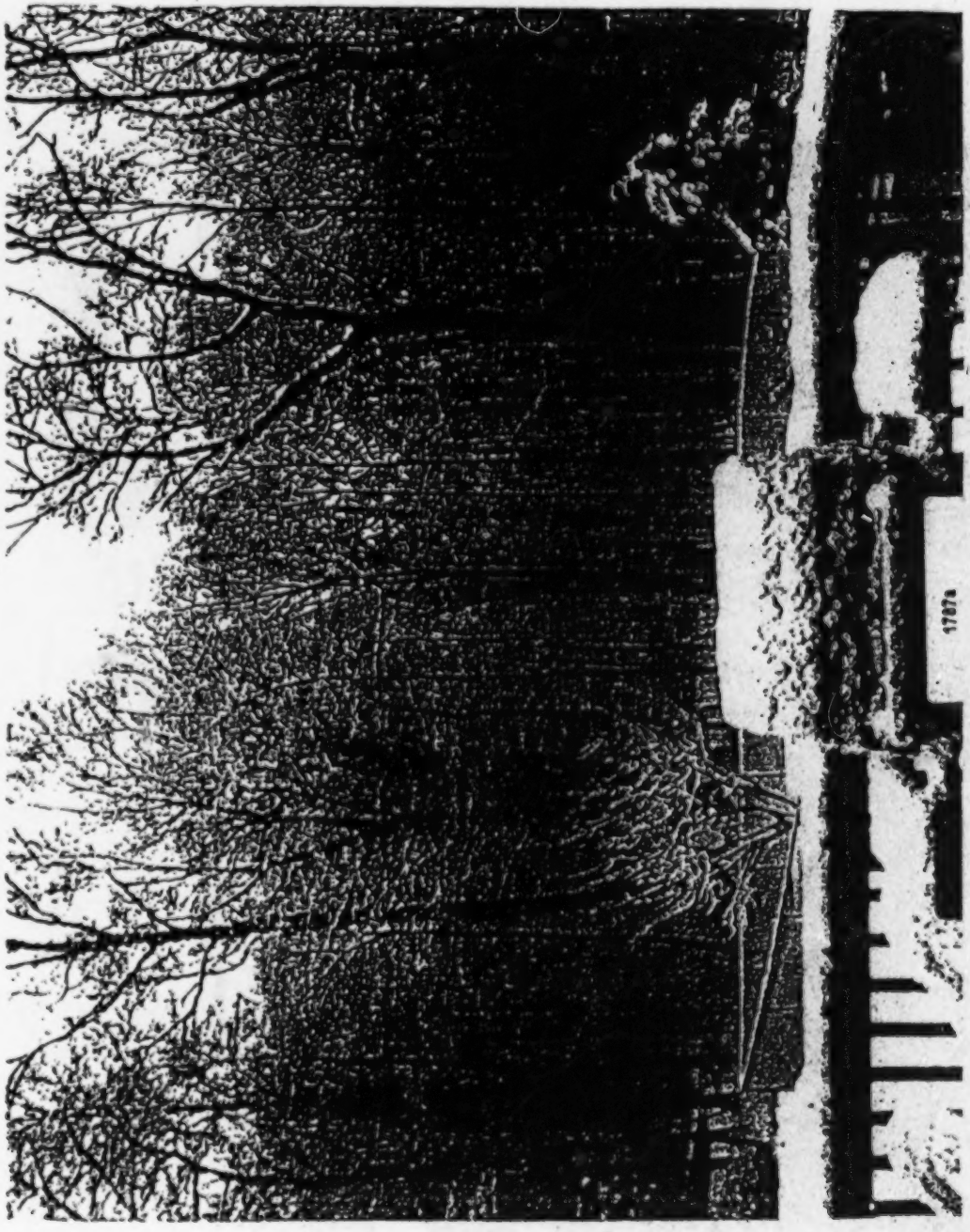

http://www.timesherald.com/site/news.cfm?newsid=10754775&BRD=1672&PAG=461&dept_id=33380&rfi=6

Township fights golf course ruling

By: KEITH PHUCAS, Times Herald Staff

01/06/2004

UPPER MERION - After discovering a former state Supreme Court justice previously represented a firm interested in developing Valley Forge Golf Club, the township asked the court to withdraw a recent decision clearing the way for commercial development of the property.

In the township's request to have the decision withdrawn and have the case reargued, the municipality accused former Pennsylvania Supreme Court Justice William Lamb of a conflict of interest in the zoning case.

On Dec. 18, Lamb wrote the majority opinion reversing a prior court decision that denied developer Realen Valley Forge Greenes Associates' request to change the golf course's zoning from agricultural to commercial use.

In the decision, Lamb wrote that the township's Zoning Hearing Board overstepped its authority when it refused to change the zoning.

For nearly seven years, Realen Valley Greenes Associates has been trying to win approval to build a shopping center, two hotels, commercial offices, 480 apartment units and 192 townhouses on the 135-acre property on North Gulph Road, in the heart of King of Prussia.

However, the Upper Merion zoning board denied the firm's requests.

In 1981 and 1982, Lamb, then an attorney representing Acorn Development Corp., twice argued to have part of the golf course rezoned to allow for commercial development for his client. The zoning board twice denied Acorn's requests.

Ralph Volpe, chairman of Upper Merion's Board of Supervisors, researched the hearing records that dated back more than two decades, which confirmed his suspicions that Lamb had been involved.

Volpe believes Lamb's handling of the case is clearly biased, and said the former justice should have recused himself.

"It's unbelievable to me that he could have done this and not tell anybody," Volpe said. On Jan. 31, 2003, the state Senate confirmed Lamb as a temporary replacement for Justice Stephan Zappala, who had retired from the bench.

Lamb, who has returned to private practice at his West Chester law firm, said he did disclose his past involvement with the Valley Forge Golf Club to both attorneys arguing the case before the state Supreme Court last year.

"I raised that issue at oral argument and (neither) of the parties had a problem with it," Lamb said.

In the court decision, the justices said that Upper Merion's zoning board overstepped its power when it denied Realen's 1999 zoning challenge, and that the decision constituted unlawful "reverse spot zoning."

The term "spot zoning" refers to singling out a parcel of land and treating it differently from surrounding properties. Such practices are unconstitutional.

The court concluded that because a substantial portion of property surrounding the golf course was previously zoned agricultural, and had been rezoned for commercial use over the years, the township's efforts to block a similar zoning change for the property was illegal.

Golf course owner Hankin Family Partnership has a conditional agreement of sale with the Realen group.

Realen filed its initial zoning challenge in 1997. The township's zoning board held 14 hearings on the application before finally turning it down in August 1999. Previously, the township zoning board ruled the golf course's agricultural zoning was, in fact, flexible enough to provide reasonable use of the land.

The zoning permitted a variety of uses, including single-family homes; an educational or religious facility; a hospital or convalescent home; or laboratory for scientific, agricultural or industrial research.

However, Realen had not shown an interest in pursuing these other uses.

In 1998, the township offered to purchase the golf course from the Hankin partnership for $4.8 million. However, Volpe said, the township never received a response to the offer.

In 2001, the Hankin partnership filed a court petition alleging the municipality substantially limited the property's future development and sued Upper Merion for about $24 million.

Currently, a federal civil rights action has been on hold while the zoning case was being decided by the state Supreme Court.

Valley Forge Golf Club first opened in 1924 and was eventually zoned in 1953.

By Keith Phucas can be reached at kphucas@timesherald.com or at 610-272-2501, ext. 211

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Posted on Thu, Nov. 27, 2003

Chesco judge Sanchez nominated to U.S. bench

Several openings in Pennsylvania's Eastern District should give the GOP a long-term influence on the court's makeup.

By Kathleen Brady Shea and Tom Infield

Inquirer Staff Writers [editor's note: *Philadelphia Inquirer*]

Chester County Court Judge Juan R. Sanchez, a native of Puerto Rico who grew up in a Bronx housing project, has been nominated by the White House for a seat on the federal bench.

The nomination is for one of up to five federal judgeships that may be filled in the coming months in Pennsylvania's Eastern District. The openings present Republicans with an opportunity to shape the judicial makeup of the court for years to come.

Sanchez, 47, would replace U.S. District Court Judge Jay C. Waldman in Pennsylvania's Eastern District. Waldman died of cancer in May.

"It is hard to put into words how I feel," Sanchez said yesterday, after receiving the news Tuesday evening. "This is a tremendous privilege and an honor; I am grateful for the President's nomination and for all the support I received during the process."

Sanchez's name was submitted to the White House with the backing of Pennsylvania's Republican leadership, including the party's organization in Chester County. He must now pass muster with the Senate Judiciary Committee, which will make a recommendation to the Senate, which votes on the selection.

Sanchez, known for his work ethic and passion for the law, said he did not expect the process to begin until January.

"I've absolutely no doubt that he will be confirmed quickly and smoothly," said Chester County Court Judge Robert J. Shenkin. "After all, when you look at him and his record, what's there not to like?"

Sanchez made national news in the summer when he ordered a West Chester man who spit at a police officer to read and prepare a book report on "To Kill a Mockingbird," which has a pivotal spitting sequence.

"Judge Sanchez can best be described as a dynamo," said President Judge Howard P. Riley Jr. "I don't know where he gets the time and energy to do all the projects he does, but he never does any of them halfheartedly; he'll be a huge loss."

U.S. District Judge J. Curtis Joyner, the last Chester County judge to join the federal bench, in 1992, said he expected Sanchez to be confirmed easily.

"He's already cleared the biggest hurdles," Joyner said. "I think it's wonderful; Chester County needs added representation on the federal circuit, and Juan is an excellent jurist."

Sanchez is the third Philadelphia-area Republican nominated by Bush to the Eastern District court this month.

The nomination comes amid an unusually large number of openings and anticipated openings - as many as five - between now and early next year. The court currently has 19 active judges and 17 senior judges.

Taken together, the openings give the White House and its Pennsylvania GOP allies a chance to have a long-term influence on the makeup of the court.

On Nov. 3, Bush nominated Gene E.K. Pratter, a partner in Duane Morris L.L.P., a major national law firm based in Philadelphia. Pratter, of Bryn Mawr, would fill a spot that was more or less allotted to the GOP in Montgomery County. Pratter and her husband, Robert, have been election-campaign donors to Bush, Sens. Arlen Specter and Rick Santorum, and the Republican National Committee.

On Nov. 6, Bush nominated Lancaster County Common Pleas Court Judge Lawrence F. Stengel, 51, to replace another judge from the county on the federal bench.

Presidents traditionally have acceded to in-state political forces when nominating federal court judges. The rule of thumb in Pennsylvania has long been that the party holding the White House gets three nominations for every one given to the party that is out of power.

A state's U.S. senators typically play a lead role in selecting the nominees. In Pennsylvania, Republicans Specter and Santorum have more or less agreed to split the state, east and west. Santorum, who is from Pittsburgh, has the larger influence in selection of nominees from the western part of the state. Specter tends to hold sway in the east.

A judicial nominating panel, which interviewed candidates for the Eastern District slots on behalf of Specter and Santorum, is chaired by Thomas R. Kline, law partner of Specter's son, Shanin.

"Political leaders also have their favorites who they put forward," said Alan P. Novak, Pennsylvania Republican chairman.

In Chester County, GOP leaders have been pushing for one of their own to step up to the bench.

Novak, former Chester County Republican chairman, said Sanchez was long his choice, along with that of current [illegible] Brown and former Chairman William Lamb. Lamb is [illegible] Superior Court and is barred from participating in partisan politics.

"We all sang from the same hymnal on this one," Novak said. "If Chester County was going to get a judgeship, we wanted that to be Judge Sanchez.

"Judge Sanchez had to make his own case to the senators, to the White House, and through the interview process," he said. "The candidates still have to stand on their own two feet."

Novak said that because Sanchez was an assistant public defender, "everyone assumes he is a moderate."

"But I think people, when they look at him as a judge, consider him as fairly conservative," Novak said. "I think he is a tough judge when it comes to law-and-order issues."

It may be in Specter's interest to have judicial nominees whom he supports to be regarded as political conservatives.

Specter, who is running for reelection next year, faces a party opponent, U.S. Rep. Patrick Toomey, who has criticized him as too liberal for the state GOP.

Contact staff writer Kathleen Brady Shea at 610-701-7625 or kbrady@phillynews.com.

October 9-15, 2003

political notebook

Judge Ye

by Mary F. Patel

In case anyone is interested, voters will also be choosing judges in the Nov. 4 general election. While the focus has been on the hotly contested mayor's race and Republican City Council at-large races, the judicial elections are just as important.

It is vital to elect competent judges because the odds are you will end up in front of one of them at some point in your life. Even if you're not accused of a crime, many people in this town are either suing or being sued. A renowned trial lawyer once said, If you haven't been sued, you haven't lived.

At the top of the judicial ticket are candidates for the State Supreme Court. There is one opening on the Supreme Court. Former Justice **Stephen Zappala**, a Democrat, stepped down in late 2002 due to mandatory retirement. Republican **William Lamb** was appointed by former Gov. **Mark Schweiker** to fill the vacancy through the end of the year, on the condition that Lamb would not run.

Democrat **Max Baer** and Republican **Joan Orie Melvin** are competing for the Supreme seat. Melvin is currently a state Superior Court judge. Her sister is State Sen. **Jane Clare Orie**, who is also her campaign chair. Melvin, who is said to be a devout Catholic, has not discussed her views on choice, but has been endorsed by LifePac and other pro-life groups.

Baer is a Pittsburgh Common Pleas Court Judge and makes no bones about the fact that he is pro-choice. In an interview this summer, Baer said that he thought the biggest issue in this race will be abortion rights.

Even if Baer wins the open seat on the Supreme Court, Republicans will still dominate the seven-member court.

Chief Justice **Ralph Cappy** is a Democrat. So is Justice **Russell Nigro**. Justice **Ron Castille**, who is facing a vote on his retention in this ballot, is a Republican, as are Justices **Sandra Schultz Newman**, **Michael Eakin** and **Thomas Saylor**.

Even though the Supreme Court only hears cases at its discretion, the high court is very busy. And although you will probably be lucky enough not to ever have any interaction with the Supreme Court directly, they are the administering authority for all of the lower courts and therefore all state justice.

The Supreme Court hears 7 to 10 percent of all cases. For example, in a county court there were 2,760 cases appealed to the Supreme Court and they heard 189 of those cases. But they did review the other 2,571 cases, said **Arthur Heinz** of Supreme Court Administration.

Death penalties are automatically appealed to them.

Heinz mentioned other major projects that the Supremes are involved with.

Justice Newman is currently working with a subcommittee to assess the needs of security in the courtroom, said Heinz. And other justices are involved with working to have information about cases in the lower courts available online. Currently, the status and latest update of appellate court cases is available online. Such information is not available for Common Pleas Court cases. (Philadelphia Municipal Court maintains its own website that has information about the court and its schedule.)

There are three openings in the state Superior Court. This is where appeals go from Common Pleas Court decisions. It is a busy and active court because many parties appeal lower court decisions and the court must hear all of them.

The three Republicans running are **Susan Gantman**, a former assistant district attorney in Montgomery County, **Grainger Bowman**, a former deputy district attorney in Dauphin County, and **Palmer Dolbin**, a Schuylkill County Common Pleas Court judge.

The Democrats in the race are Philadelphia Municipal Court Judge **Seamus McCaffery**, Northampton Common Pleas Court Judge **Jack Panella** and Westmoreland County Common Pleas Court Judge **John Driscoll**.

There is not much action with local judgeships. There are 11 openings on Common Pleas Court and the 11 candidates who won in last May's primary are guaranteed to win in the general election because they are all cross-filed as Democrats *and* Republicans. **Gerard Kosinski**, a well-known ward leader, is the lone Municipal Court candidate on the ballot.

Superior Court President Judge **Joseph Del Sole** is up for a retention vote, as is Commonwealth Court President Judge **James Gardner Colins**. There are 14 Common Pleas Court judges up for retention and five Municipal Court judges up for retention.

The **Ron Patel** Scholarship Fund is now accepting applications for 2004. This year, the $5,000 scholarship will be awarded to a photojournalism student to advance his or her graduate or undergraduate education. Each applicant should submit his or her photo essay on a CD, which must be accompanied by a résumé and a letter of recommendation from an instructor. Mail CDs to Mary Patel, President, Ron Patel Scholarship Fund, Pen & Pencil Club, 1522 Latimer St, Philadelphia, PA 19102. The deadline is Dec. 1, 2003.

The Philadelphia Conference, a consortium of photographers and photojournalists, is assisting with outreach and has details about the scholarship on its website, www.philadelphiaconference.org.

Ron Patel was the renowned editor of the Sunday *Inquirer*, and this reporter's husband, until his death on Jan. 7, 2000.

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http://www.pegweb.org/Political/political_news.htm

Pennsylvanians for Effective Government

Political News

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January 2003

JUDICIAL RACES. The statewide elections in 2003 are for judicial vacancies. There will be three Superior Court vacancies and one Supreme Court vacancy filled in November. [redacted] this month of William Lamb [redacted] term through November. Lamb was nominated with the agreement that he would not be a candidate. The Supreme Court vacancy comes from the mandatory retirement at age 70 of former Chief Justice Stephen A. Zappala. The Superior Court hears appeals of criminal and civil cases. Its decisions can set statewide precedents in civil jury awards – crucial matters to the business community in product liability and professional malpractice cases.

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APPENDIX N - **EXCERPTS** FROM UNCONSOLIDATED PENNSYLVANIA STATUES TITLE 53: MUNICIPAL CORPORATIONS

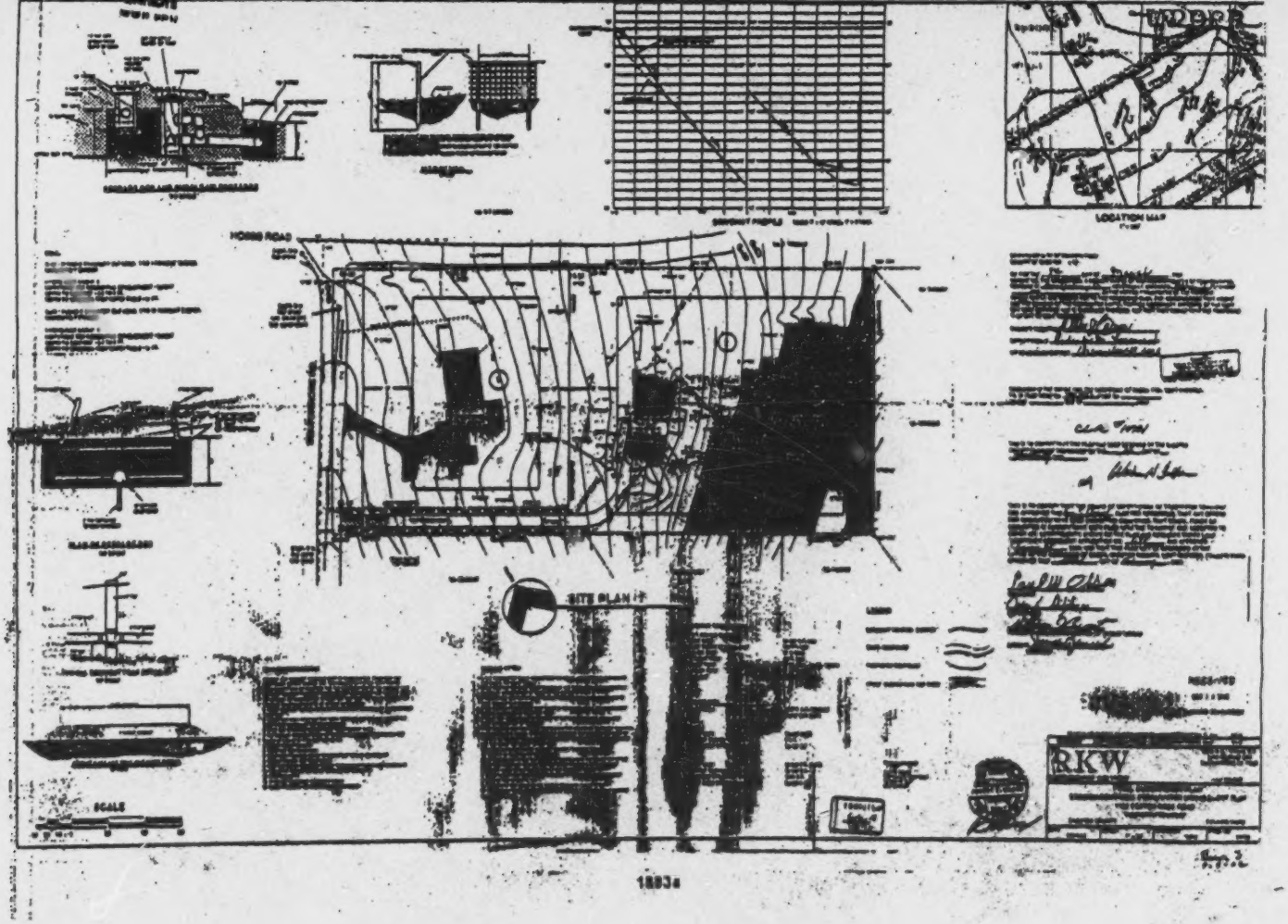
CHAPTER 30. PENNSYLVANIA MUNCIPALITIES PLANNING CODE

§10908. Hearings.

The board shall conduct hearings and make decisions in accordance with the following requirements:

(1) Public notice shall be given and written notice shall be given to the applicant, the zoning officer, such other persons as the governing body shall designate by ordinance and to any person who has made timely request for the same. Written notices shall be given at such time and in such manner as shall be prescribed by ordinance or, in the absence of ordinance provision, by rules of the board. in addition to the written notice provided herein, written notice of said hearing shall be conspicuously posted on the affected tract of land at least one week prior to the hearing.

(1.1) The governing body may prescribe reasonable fees with respect to hearings before the zoning hearing board. Fees for said hearings may include compensation for the secretary and members of the zoning hearing board, notice and advertising costs, however, shall not include legal expenses of the



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SITE PLAN

CONSTRUCTION STAGING

EROSION AND SEDIMENT CONTROLS MUST BE CONSTRUCTED, STABILIZED AND FUNCTIONAL BEFORE ANY SITE DISTURBANCE MAY BEGIN. ONLY LIMITED DISTURBANCE SHALL BE PERMITTED FOR THE CONSTRUCTION OF THESE EROSION AND SEDIMENT CONTROL FACILITIES. CONSTRUCTION PROCEDURE AND STAGING SEQUENCE ARE CRITICAL TO CAREFULLY LIMIT DISTURBANCE TO ENSURE THAT THE SITE REMAINS STABILIZED THROUGHOUT CONSTRUCTION. CONSTRUCTION IS TO BE STAGED AS FOLLOWS:

1) PLACE SEDIMENT CONTROL BARRIERS IMMEDIATELY DOWNHILL OF EARTH MOVING ACTIVITIES.

2) CLEAR AND GRUB CONSTRUCTION AREA, REMOVING THE SMALLEST AMOUNT OF VEGETATION NECESSARY FOR CONSTRUCTION.

3) STORE AND STOCKPILE TOPSOIL FROM CONSTRUCTION AREA.

4) THE TOPSOIL STOCKPILE SHALL BE TEMPORARILY SEEDED WITH ANNUAL RYE GRASS AT A RATE OF 4 LBS. PER 1000 SQ. FT.

5) ROUGH GRADE DRIVEWAY

6) EXCAVATE FOR FOUNDATION.

7) CONSTRUCT BUILDING, GRADE DRIVEWAY AND INSTALL STONE BASE.

8) SPREAD TOPSOIL AND FINISH GRADE.

9) SEED AND MULCH DISTURBED AREA IN ACCORDANCE WITH RADOT FORMULA B.

10) EXCAVATE AND INSTALL STONE SEEPAGE BED AND SEPTIC.

11) PAVE DRIVEWAY.

12) STABILIZE ADDITIONAL DISTURBED AREAS.

13) REMOVE EROSION AND SEDIMENT CONTROLS.

GENERAL NOTES:

1. THE CONTRACTOR SHALL COMPLY WITH ALL LOCAL AND STATE REQUIREMENTS GOVERNING THE WORK SHOWN.

2. THE CONTRACTOR MUST VERIFY LOCATIONS AND ELEVATIONS OF ALL UNDERGROUND UTILITIES BEFORE START OF WORK. AS PER ACT 287.

3. EXCAVATION AND STRIPPING OF TOPSOIL SHALL BE KEPT TO A MINIMUM.

4. TEMPORARY STORMWATER MANAGEMENT CONTROL MEASURES SHALL BE CONSTRUCTED BEFORE EARTHMOVING ACTIVITIES BEGIN.

5. ALL CONSTRUCTION AREAS SHALL BE CLEARED OF SILT AND DEBRIS AT THE END OF EACH WORKING DAY.

6. CONTRACTOR SHALL BE RESPONSIBLE FOR PROTECTION OF EXCAVATION TRENCHES, EMBANKMENTS, SLOPES, SPOILS, STOCKPILES OR OTHER APPROVED EARTHWORK AND SHALL BE USED ON THE SITE TO PREVENT EROSION, SEDIMENT RUNOFF AND SPILLAGE OF MATERIALS NOT SHOWN BUT LIE WITHIN THE INTENT OF THE PLAN.

7. SILT FENCE, STRAW BALES, OR OTHER APPROVED SEDIMENT CONTROL BARRIERS SHALL BE PLACED AS DIRECTED BY THE ENGINEER.

8. THE LONG TERM MAINTENANCE AND OPERATION OF THE STORMWATER FACILITY FOR THE CONVEYANCE OF RUNOFF FROM THE DEVELOPMENT AREA AND SEDIMENT BASIN AND SEDIMENT TRAP AND OTHER STORMWATER MANAGEMENT FACILITIES SHALL BE THE OBLIGATION OF THE PROPERTY OWNER.

9. TOPOGRAPHY FROM INFORMATION PROVIDED BY THE [illegible] FIELD SURVEY BY THIS OFFICE (1/94).

10. ELEVATIONS ARE BASED ON THE [illegible] DATUM.

11. DOWNSPOUTS SHALL BE CONNECTED TO [illegible] WRAPPED WITH FILTER FABRIC.

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zoning hearing board, expenses for engineering, architectural or other technical consultants or expert witness costs.

(1.2) The hearing shall be held within 60 days from the date of the applicant's request, unless the applicant has agreed in writing to an extension of time.

(2) The hearing shall be conducted by the board or the board may appoint any member as a hearing officer. The decision, or where no decision is called for, the findings shall be made by the board; however, the appellant or the applicant, as the case may be, in addition to the municipality, may, prior to the decision of the hearing, waive decision or findings by the board and accept the decision or findings of the hearing officer as final.

(3) The parties to the hearing shall be the municipality, any person affected by the application who has made timely appearance of record before the board, and any other person including civic or community organizations permitted to appear by the board. the board shall have power to require that all persons who wish to be considered parties enter appearances in writing on forms provided by the board for that purpose.

(4) The chairman or acting chairman of the board or the hearing officer presiding shall have power to administer oaths and issue subpoenas to compel the attendance of witnesses and the production of relevant documents and papers, including witnesses and documents requested by the parties.

(5) The parties shall have the right to be represented by counsel and shall be afforded the opportunity to respond and present evidence and argument and cross-examine adverse witnesses on all relevant issues.

(6) Formal rules of evidence shall not apply, but irrelevant, immaterial, or unduly repetitious evidence may be excluded.

(7) The board or the hearing officer, as the case may be, shall keep a stenographic record of the proceedings. The appearance fee for as stenographer shall be shared equally by the applicant and the board. The cost of the original transcript shall be paid by the board if the transcript is ordered by the board or hearing officer or shall be paid by the person appealing from the decision of the board if such appeal is made, and in either event the cost of additional copies shall be paid by the person requesting such copy or copies. In other cases the party requesting the original transcript shall bear the cost thereof.

(8) The board or the hearing officer shall not communicate, directly or indirectly, with any party or his representatives in connection with any issue involved except upon notice and opportunity for all parties to participate, shall not take notice of any communication, reports, staff memoranda, or other materials, except advise from their solicitor, unless the parties are afforded an opportunity to contest the material so noticed and shall not inspect the site or its surroundings after the commencement of hearings with any party or his representative unless all parties are given opportunity to be present.

(9) The board or the hearing officer, as the case may be, shall render a written decision or, when no decision is called for, make written findings on the application within 45 days after the last hearing before the board or hearing officer. Where the application is contested or denied, each decision shall be accompanied by findings of fact and conclusions based thereon together with the reasons therefore. Conclusions based on any provisions of this act or of any ordinance, rule or regulation shall contain a reference to the provision relied on and the reasons why the conclusion is deemed appropriate in the light of the facts found. If the hearing is conducted by a hearing officer, and there has been no stipulation that his decision or findings are final, the board shall make his report and recommendations available to the parties within 45 days and the parties shall be entitled to make written representations thereon to the board prior to final decision or entry of findings, and the board's decision shall be entered no later than 30 days after the report of the hearing officer. Where the board fails to render the decision within the period required by this subsection, or fails to hold the required hearing within 60 days from the dated of the applicant's request for a hearing, decision shall be deemed to have been rendered in favor of the applicant unless the applicant has agreed in writing or on the record to an extension of time. When a decision has been rendered in favor of the applicant because of the failure of the board to meet or render a decision as hereinabove provided, the board shall give public notice of said decision within ten days from the last day it could have met to render a decision in the same manner as

provided in subsection (1) of this section. If the board shall fail to provide such notice, the applicant may do so. Nothing in this subsection shall prejudice the right of any party opposing the application to appeal the decision to a court of competent jurisdiction.

(10) A copy of the final decision or, where no decision is called for, of the findings shall be delivered to the applicant personally or mailed to him not later than the day following its date. To all other persons who have filed their name and address with the board not later that the last day of the hearing, the board shall provide by bail or otherwise, brief notice of the decision or findings and a statement of the place at which the full decision or findings may be examined.

§ 10908.1. Mediation option.

[to be inserted]

§ 10909. [Repeated.

§ 10909.1 Jurisdiction.

(a) The zoning hearing board shall exclusive jurisdiction to hear and render final adjudications in the following matters:

1. Substantive challenges to the validity of any land use ordinance, except those brought before the governing body pursuant to sections 609.1 and 916.1 (a)(2).

2. Challenges to the validity of a land use ordinance raising procedural questions or alleged defects in the process of enactment or adoption which challenges

shall be raised by an appeal taken within 30 days after the effective date of said ordinance. Where the ordinance appealed from is the initial zoning ordinance of the municipality and zoning hearing board has not been previously established, the appeal raising procedural questions shall be taken directly to court.

3. Appeals from the determination of the zoning officer, including, but not limited to, the granting or denial of any permit, or failure to act on the application therefore, the issuance of any cease and desist order or the registration or refusal to register any nonconforming use, structure or lot.

4. Appeals from a termination by a municipal engineer or the zoning officer with reference to the administration if any flood plain or flood hazard ordinance or such provisions within a land use ordinance.

5. Applications for variances from the terms of the zoning ordinance and flood hazard ordinance or such provisions within a land use ordinance, pursuant to section 910.2.

6. Applications for special exceptions under the zoning ordinance or flood plain or flood hazard ordinance or such provisions within a land use ordinance, pursuant to section 912.1

7. Appeals from the determination of any officer or agency charged with the administration of any trans

fers of development rights or performances density provisions of the zoning ordinance.

8. Appeals from the zoning officer's determination under section 916.2.

9. Appeals from the determination of the zoning officer or municipal engineer in the administration of any land use ordinance or provision thereof with reference to sedimentation and erosion control and storm water management insofar as the same relate to development not involving Article V or VII applications.

(b) The governing body or, except as to clauses (3), (4) and (5), the planning agency, if designated, shall have exclusive jurisdiction to hear and render final adjudications in the following matters:

1. All applications for approvals of planned residential developments under Article VII pursuant to the provisions of section 702.

2. All applications pursuant to section 508 for approval of subdivisions or land developments under Article V. Any provision in a subdivision and land development ordinance requiring that final action concerning subdivision and land development applications to be taken by a planning agency rather than the governing body shall vest exclusive jurisdiction in the planning agency in lieu of the governing body for purposes of the provisions of this paragraph.

3. Applications for curative amendment to a zoning ordinance pursuant to section 603 (c)(2).

4. Applications for curative amendment to a zoning ordinance pursuant to sections 609.1 and 916.1 (a)(2).

5. All petitions for amendments to land use ordinances, pursuant to the procedures set forth in section 609.. Any action on such petitions shall be deemed legislative acts, provided the nothing contained in this clause shall be deemed to enlarge or diminish existing law with reference to appeals to court.

6. Appeals from the determination of the zoning officer or the municipal engineer in the administration of any land use ordinance or provisions thereof with reference to sedimentation an erosion control and storm water management insofar as the same related to application for land development under Articles V and VII. Where such determination relates only to development not involving an Article V or VII application, the appeal from such determination of the zoning officer or the municipal engineer shall be to the zoning hearing board pursuant to subdivision (a)(9). Where the applicable land use ordinance vests jurisdiction for final administration of subdivision and land development applications in the planning agency, all appeals form determinations under this paragraph shall be to the planning agency and all appeals from the decision of the planning agency shall be to court.

7. Applications for a special encroachment permit pursuant to section 405 and applications for a permit pursuant to section 406.

§ 10910.1. Applicability of judicial remedies.

Nothing contained in this article shall be construed to deny the appellant the right to proceed directly to court where appropriate, pursuant to the Pennsylvania Rules of Civil Procedure No. 1091 (relating to action in mandamus).

UNCONSOLIDATED PENNSYLVANIA STATUES (TITLE 53)

PENNSYLVANIA MUNCIPALITIES PLANNING CODE

Article X-A. Appeals to Court.

§ 11001 – A. Land use appeals.

§ 11002 – A. Jurisdiction and venue on appeal; time for appeal.

§ 11003 – A. Appeals to court; commencement; stay of proceedings.

§ 11004 – A. Intervention.

§ 11005 – A Hearing and argument of land use appeal.

§ 11006 – A. Judicial relief.

§ 11001 – A. Land use appeals

The procedures set forth in this article shall constitute the exclusive mode for securing review of any decision rendered pursuant to Article IX or deemed to have been made under this act.

§ 11002 – A. Jurisdiction and venue on appeal; time for appeal.

All appeals from all land use decisions rendered pursuant to Article IX shall be taken to the court of common pleas of the judicial district wherein the land is located and shall be filed within 30 days after entry of the decision as provided in 42 Pa.C.S. § 5572 (relating to time of entry of order) or, in the case of a deemed decision, within 30 days after the date upon which notice of said deemed decision is given as set forth in section 908(9) of this act.

§ 11003-A. Appeals to court; commencement; stay of proceedings.

(a) Land use appeals shall be entered as of course by the prothonotary or clerk upon the filing of a land use appeal notice which concisely sets forth the grounds on which the appellant relies. The appeal notice need not be verified. The land use appeal notice shall be accompanied by a true copy thereof.

(b) Upon filing of a land use appeal, the prothontary or clerk shall forthwith, as of course, send to the governing body, board or agency whose decision or action has been appealed,

by registered or certified mail, the copy of the land use appeal notice, together with a writ of certiorari commanding said governing body, board or agency, within 20 days after receipt thereof, to certify to the court its entire record in the matter in which the land use appeal has been taken, or a true and complete copy thereof, including any transcript of testimony in existence and available to the governing body, board or agency at the time it received the write of certiorari.

(c) If the appellant is a person other than the landowner of the land directly involved in the decision or action appealed from, the appellant, within seven days after the land use appeal is filed, shall serve a true copy of the land use appeal notice by mailing said notice to the landowner or his attorney at his last known address. For identification of such landowner, the appellant may rely upon the record of the municipality and, in the event of good faith mistakes as to such identity, may make such service nunc pro tunc by leave of court.

(d) The filing of an appeal in court under this section shall not stay the action appealed from, but the appellants may petition the court having jurisdiction of land use appeals for a stay. If the appellants are persons who are seeking to prevent a use or development of the land of another, whether or not a stay is sought by them, the landowner whose use or development is in question may petition the court to order the appellants to post bond as a condition to proceeding with the appeal. After the petition for posting a bond is presented, the court shall hold a hearing to determine if the filing of the appeal is frivolous. At the hearing, evidence may be presented

on the merits of the case. It shall be the burden of the landowners to provc the appeal is frivolous. After consideration of all evidence presented, if the court determines that the appeal is frivolous, it shall grant the petition for posting a bond. The right to petition the court to order the appellants to post bond may be waived by the appellee, but such waiver may be revoked by him if an appeal is taken from a final decision of the court. An order denying a petition for a bond shall be interlocutory. And order directing the respondent to the petition for posting a bond to post a bond shall be interlocutory. If an appeal is taken by a respondent to the petition for posting a bond, such responding party, upon motion of petitioner and, after hearing in the court having jurisdiction of land use appeals, shall be liable for all reasonable costs, expenses and attorney fees incurred by petitioner.

§ 11004-A. Intervention.

Within the 30 days first following the filing of a land use appeal, if the appeal is from a board or agency of a municipality, the municipality and any owner or tenant of property directly involved in the action appealed from may intervene as of course by filing a notice of intervention, accompanied by proof of services of the same, upon each appellant or each appellant's counsel of record. All other intervention shall be governed by the Pennsylvania Rules of Civil Procedure.

§11005-A. Hearing and argument of land use appeal.

If, upon motion, it is shown that proper consideration of the land use appeal requires the presentation of additional evidence, a judge of the court may hold a hearing to receive ad

ditional evidence, may remand the case to the body, agency or officer whose decision or order has been brought up for review, or may refer the case to a referee to receive additional evidence, provided that appeals brought before the court pursuant to section 916/1 shall be remanded for further hearings before any body, agency or officer of the municipality. If the record below includes findings of fact made by the governing body, board or agency whose decision or action is brought up for review and the court does not take additional evidence or appoint a referee to take additional evidence, the findings of the governing body, board or agency shall not be disturbed by the court if supported by substantial evidence. If the record does not include findings of fact or if additional evidence is taken by the court or by a referee, the court shall make its own findings of fact based on the record below as supplemented by the additional evidence, if any.

§ 11006-A. Judicial relief.

(a) in a land use appeal, the court shall have power to declare any ordinance or map invalid and set aside or modify any action, decision or order of the governing body, agency or officer of the municipality brought up on appeal.

(b) Where municipalities have adopted a joint municipal comprehensive plan an enacted a zoning ordinance or ordinances consistent with the joint municipal comprehensive plan within a region pursuant to Articles VIII-A and XI, the court when determining the validity of a challenge to such a municipality's zoning ordinance, shall consider the zoning

ordinance or ordinances as they apply to the entire region and shall not limit its consideration to the application of the zoning ordinance within the boundaries of the respective municipalities.

(b.1) Where municipalities have adopted a multimunicipal comprehensive plan pursuant to Article XI but have not adopted a joint municipal ordinance pursuant to Article VIII-A and all municipalities participating in the mulitmunicipal comprehensive plan have adopted and are administrating zoning ordinances generally consistent with the provisions of the mulitmunicipal comprehensive plan, and a challenge is brought to the validity of a zoning ordinance of a participating municipality involving a proposed use, then the court shall consider the availability of uses under zoning ordinances within the municipalities participating in the mulimunicipal comprehensive plan within a reasonable geographic area and shall not limit its consideration to the application of the zoning ordinance on the municipality whose zoning ordinance is being challenged.

(c) if the court finds that an ordinance or map, or a decision or order thereunder, which has been brought up for review unlawfully prevents or restricts a development or use which has been described by the landowner through plans and other materials submitted to the governing body, agency, or officer of the municipality whose action or failure to act is in question on the appeal, it may order the described development or use other elements to the governing body, agency or officer having jurisdiction thereof for further proceedings, including the adoption of alternative restrictions, in accordance with the court's opinion and order.

(d) Upon motion by any of the parties or upon motion by the court, the judge of the court may hold a hearing or hearings to receive additional evidence or employ experts to aid the court to frame an appropriate order. If the court employs an expert, the report or evidence of such expert shall be available to any party and he shall be subject of examination or cross-examination by any party. He shall be paid reasonable compensation for his services which may be assessed against any or all of the parties as determined by the court. The court shall retain jurisdiction of the appeal during the pendency of any such further proceedings and may, upon motion of the landowner, issue such supplementary orders as it deems necessary to protect the rights of the landowner as declared in its opinion and order.

(e) The fact that the plans and other materials are not in a form or are not accompanied by other submissions which are required for final approval of the development or use in question or for the issuance of permits hall not prevent the court from granting the definitive relief authorized. The court may act upon preliminary or sketch plans by framing its decree to take into account the need for further submissions before final approval is granted.

(4)

No. 04-661

Supreme Court, U.S.
FILED
DEC 17 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

BONNIE J. KORESKO and
JOHN J. KORESKO, V,

Petitioners,

v.

MARK FARLEY, SEATON ROSS, L.P.,
TOWNSHIP OF TREDYFFRIN, BRYN MAWR
CUSTOM HOME, INC., and OLLIE BOWER,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Pennsylvania

BRIEF IN OPPOSITION FOR RESPONDENTS MARK FARLEY, SEATON ROSS, L.P., AND BRYN MAWR CUSTOM HOME, INC.

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OR CALL COLLECT (402) 342-2831

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents Mark Farley, Seaton Ross, L.P., and Bryn Mawr Custom Home, Inc., state the following:

Respondent Seaton Ross, L.P., is a registered Pennsylvania limited partnership. The general partner of Respondent Seaton Ross, L.P., is Respondent Bryn Mawr Custom Home, Inc.

Respondent Bryn Mawr Custom Home, Inc., is a registered Pennsylvania corporation. Respondent Bryn Mawr Custom Home, Inc., has no parent corporation(s) nor does any publicly held company(ies) own ten percent (10%) or more of the stock of Respondent Bryn Mawr Custom Home, Inc.

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INTRODUCTION AND REASONS FOR DENYING THE WRIT

Respondents, Mark Farley ("Farley"), Seaton Ross, L.P. ("Seaton Ross"), and Bryn Mawr Custom Home, Inc. ("BMCH") (collectively, the "Farley Respondents"), hereby file, pursuant to Supreme Court Rule 15, this brief in opposition to the petition for a writ of certiorari filed by Petitioners, Bonnie J. Koresko and John J. Koresko, V, Esquire (collectively, the "Koreskos" and/or "Petitioners"). In their petition for a writ of certiorari ("Petition for Writ"), the Koreskos ask this Supreme Honorable Court to review the August 9, 2004, decision of the Supreme Court of Pennsylvania which denied the Koreskos' petitions for allowance of appeal to that Honorable Court.

This case involves matters of Pennsylvania property rights.[1] In the courts below, the Koreskos unsuccessfully sought to change longstanding Pennsylvania real property law and precedent. The Koreskos asked the Pennsylvania courts to create and/or find a property right(s) in and/or for the subterranean tree roots of trees allegedly owned by the Koreskos and which bordered and/or were in close proximity to an adjacent parcel of land being developed by Seaton Ross and BMCH. The Koreskos also contended, among other things, that they were denied due process as a result of the failure to notify them of the approval of the subdivision plan for the parcel of land adjoining/adjacent to the Koreskos' property, which parcel was being developed by Seaton Ross and BMCH.

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[1] For background, the instant matter is one (1) of five (5) separate cases filed by Petitioner John J. Koresko, V, Esquire, against Respondent Mark Farley, Mr. Farley's relatives, and Mr. Farley's business entities. The cases evolve out of a prior acrimonious attorney-client relationship between, among others, Petitioner John J. Koresko, V, Esquire, and Respondent Mark Farley. All of the five (5) aforementioned matters were filed after Mr. Koresko had learned that Mr. Farley had purchased and/or was developing a parcel of land adjacent to Petitioners' home.

The Koreskos' claims of the denial of their property rights and of due process were struck down by the learned trial court, the Commonwealth Court of Pennsylvania, and the Supreme Court of Pennsylvania. The learned trial court, finding that no right(s) existed under Pennsylvania law with regard to encroaching tree roots, and that the Pennsylvania Municipalities Planning Code provided the exclusive method to challenge the subdivision approval, granted the various motions for judgment/partial judgment on the pleadings filed by the named defendants in this case, including the Farley Respondents, and denied the Koreskos' motion for summary judgment. The Koreskos then voluntarily discontinued their remaining claim(s). On direct appeal, the Commonwealth Court of Pennsylvania upheld and affirmed the findings of the learned trial court. The Koreskos then each filed petitions for allowance of appeal to the Supreme Court of Pennsylvania which denied discretionary review. The Koreskos now ask this Supreme Honorable Court to review this matter based on perceived due process violations, allegedly unconstitutional local subdivision ordinances, and a perceived need for a uniform and national law regarding encroaching tree roots.

As will be more fully discussed *infra*, the Koreskos' Petition for Writ must be denied. This case involves matters of state real property law and does not involve any question(s) of federal law or fundamental rights. The Koreskos were afforded due process but failed to avail themselves of the mandatory and exclusive state law procedures. Moreover, the Koreskos have failed to set forth compelling reasons for granting the Petition for Writ and have failed to set forth any of the character of reasons, as enumerated in Supreme Court Rule 10(a) through 10(c), that this Supreme Honorable Court considers in determining whether to grant certiorari. Notably, the Koreskos' Petition for Writ also contains misstatements of fact and law, as discussed *infra*, that bear on the issues that may be properly before this Supreme Honorable Court if certiorari were granted.

COUNTERSTATEMENT OF THE CASE

A. Pertinent Procedural Background

The procedural history of this case is tortured and extensive; however, consideration of the following pertinent procedural history is necessary to the consideration of the instant Petition for Writ.

On June 25, 2001, the Koreskos initiated this action against the Farley Respondents (Farley, Seaton Ross, and BMCH), Ollie Bower ("Bower"), the prior owner of the property at issue, and the Township of Tredyffrin ("Tredyffrin Township"), the township where the property at issue is situated, by filing a Complaint in Equity (the "Original Complaint"). The Original Complaint listed various, inexplicit causes of action[2] against all of the named defendants regarding the sale and development of real property located at 1175-1185 Seaton Ross Road, Tredyffrin Township, Chester County, Pennsylvania (the "Property").

On March 6, 2002, with court permission, the Koreskos filed an amended complaint (the "Amended Complaint"). The Amended Complaint added and named Stephen D. Kaye and Diana S. Kaye (collectively, the "Kayes") and Robert W. Grupp and Jan M. Grupp (collectively, the "Grupps")[3] as defendants in this matter (in addition to those defendants named in the Original Complaint). The Amended Complaint also contained six (6) inexplicit causes of action against all of the named defendants regarding the sale and development of the Property.

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[2] The Pennsylvania Rules of Civil Procedure relating to pleading practice require fact pleading.

[3] At the time of the filing of the Amended Complaint, the Kayes and the Grupps were the respective owners of the two (2) parcels that now comprise the Property. The Koreskos' property, located at 1159 Seaton Ross Road, Tredyffrin Township, Chester County, Pennsylvania (the "Koreskos' Property"), shares a common boundary with 1175 Seaton Ross Road, the property owned by the Grupps at the time of the filing of the Amended Complaint. The Kayes owned 1185 Seaton Ross Road. Of note, in their instant Petition for Writ, the Koreskos have not named either the Grupps or the Kayes as respondents.

On August 2, 2002, after the pleadings were closed, the Grupps and the Kayes filed a joint motion for judgment on the pleadings.[4] On August 6, 2002, Farley and Seaton Ross filed a motion for partial judgment on the pleadings. On August 23, 2002, BMCH filed a motion for partial judgment on the pleadings. The Koreskos filed responses to each of the respective motions for judgment/partial judgment on the pleadings.[5]

On or about August 23, 2002, the Koreskos filed a motion to disqualify the law firm of Lamb, Windle & McErlane, P.C., as counsel for Tredyffrin Township, along with supporting documents. Tredyffrin Township filed a response to the motion to disqualify on September 6, 2002.

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[4] In Pennsylvania, pursuant to then applicable Pennsylvania Rule of Civil Procedure number ("Pa.R.C.P. No.") 1034(a), "[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay the trial, any party may move for judgment on the pleadings." *See* Pa.R.C.P. No. 1034. In considering a motion for judgment on the pleadings, the Pennsylvania trial courts consider the following: in reviewing a request for judgment on the pleadings, the court must confine its consideration to the pleadings filed and accept as true all well-pleaded statements of fact, admissions, and any documents properly attached to the pleadings presented by the party against whom the motion is filed, considering only those facts which were specifically admitted. *Gambler v. Huyett,* 679 A.2d 831, 834 (Pa. Super. 1996). Judgment on the pleadings is proper if the moving party's right to succeed is certain and the case is so free from doubt that trial would be fruitless. *Swift v. Milner,* 538 A.2d 28, 31 (Pa. Super. 1988).

[5] The Koreskos did not include in the Appendix to their Petition for Writ any of the motions for judgment/partial judgment on the pleadings, or their responses thereto, filed in this case and which are the subject of the instant matter. Notwithstanding, in the Farley Respondents' respective motions for partial judgment on the pleadings, the Farley Respondents did not seek judgment on the pleadings with respect to the Koreskos' claims for trespass as contained in Count III of the Amended Complaint. Those claims, the only claims remaining after the learned trial court granted the respective motions for judgment/partial judgment on the pleadings filed by the named defendants, were voluntarily discontinued by the Koreskos on February 12, 2003. *See infra,* at p. 7.

On September 16, 2002, Tredyffrin Township filed a motion for judgment on the pleadings. The Koreskos filed a response to Tredyffrin Township's motion for judgment on the pleadings on October 3, 2002.

On October 28, 2002, the learned trial judge, the Honorable Robert J. Shenkin, Court of Common Pleas of Chester County, Pennsylvania, sent counsel for all parties a letter ("October 28th Letter") which, among other things, scheduled oral argument on all motions outstanding in this case at that time including, but not limited to, the motions for judgment/partial judgment on the pleadings filed by the Farley Respondents, the Grupps, and the Kayes. The October 28th Letter also invited the Koreskos to file, if they desired and if such filing would cure the deficiencies of the Amended Complaint, a further amended complaint. The Koreskos **did not** avail themselves of the trial court's offer and did not file a further amended complaint in this case nor formally seek leave to do so.

On December 4, 2002, following extensive oral argument (held on two (2) different occasions), the learned trial judge entered an order (the "December 4th Order") which, among other things: (1) granted the motion for judgment on the pleadings filed by the Grupps and the Kayes and entered judgment in favor of the Grupps and the Kayes and against the Koreskos in no amount; (2) granted the motions for partial judgment on the pleadings filed by the Farley Respondents and entered judgment in favor of the Farley Respondents and against the Koreskos in no amount on Counts I, II, IV, V, and VI of the Amended Complaint; (3) granted the motion for judgment on the pleadings filed by Tredyffrin Township and entered judgment in favor of Tredyffrin Township and against the Koreskos in no amount; and (4) denied, as moot, the Koreskos' motion to disqualify the law firm of Lamb, Windle & McErlane, P.C., as counsel for Tredyffrin Township.

In footnotes to the December 4th Order, as is practice in the Court of Common Pleas of Chester County, Pennsylvania, the learned trial judge stated, among other things, that

> We are satisfied that Pennsylvania does not and will not recognize an easement for tree roots and overhanging branches.
>
> * * *
>
> . . . the exclusive method for challenging approval of a subdivision is pursuant to the procedures set forth in the Municipalities Planning Code [Act of July 31, 1968, P.L. 805, *as amended*, 53 P.S. §§ 10101-11202].
>
> * * *
>
> . . . in the absence of an easement, the pleadings [i.e., essentially, the Amended Complaint] fail to state any cause of action based upon the subdivision approval.

See Petitioners' Appendix ("Appendix") to their Petition for Writ, at Vol. 1, December 4th Order, n.1 and 2, pp. 109a-114a.

On November 15, 2002, the Koreskos filed a motion for partial summary judgment.[6] On December 12, 2002,

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[6] Pursuant to then applicable Pa.R.C.P. No. 1035.2,

> [a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law
>
> (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or
>
> (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.

Pa.R.C.P. No. 1035.2. A grant of summary judgment is proper where the pleadings, depositions, answers to interrogatories, admissions of record, and affidavits on file support the lower court's conclusion that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Nationwide Mutual Insurance Company v. Nixon*, 682 A.2d 1310, 1313 (Pa. Super. 1996). The court must ignore

(Continued on following page)

the Farley Respondents filed their collective response to the Koreskos' motion for partial summary judgment. By order dated December 18, 2002, and time-stamped December 19, 2002 ("December 18th Order"), the learned trial court denied the Koreskos' motion for partial summary judgment and directed the Chester County Court Administrator to list this case for trial as soon as possible.

On February 12, 2003, the Koreskos voluntarily filed a praecipe to discontinue as to the claims asserted in Count III (trespass) of their Amended Complaint, being the only claims then remaining in this matter against the Farley Respondents.

On March 25, 2003, Bower filed a motion for judgment on the pleadings. On March 26, 2003, the Koreskos filed their response to Bower's motion for judgment on the pleadings. By order dated March 27, 2003 ("March 27th Order"), the learned trial court granted Bower's motion for judgment on the pleadings and entered judgment in favor of Bower and against the Koreskos in no amount.

On April 25, 2003, the Koreskos filed a notice of appeal from the learned trial court's December 4th Order, December 18th Order, and March 27th Order.

On March 10, 2004, the Commonwealth Court of Pennsylvania filed its opinion and order (collectively "Commonwealth Court Opinion") in connection with the Koreskos' appeal whereby it affirmed the learned trial court's decisions. In so doing, the Commonwealth Court of Pennsylvania declined to recognize the existence of an

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controverted facts contained in the pleadings and restrict its review to the material filed in support of and in opposition to a motion for summary judgment and to those allegations in the pleadings that are uncontroverted. *Id.* Summary judgment should not be entered unless the case is clear and free from doubt. *Id.* Oral testimony alone, either through testimonial affidavits or depositions, of the moving party or the moving party's witnesses, even if uncontradicted, is generally insufficient to establish the absence of a genuine issue of material fact. *Nanty-Glo v. American Surety Co.*, 309 Pa. 236, 163 A. 523 (1932) (called the "Nanty-Glo Rule").

easement by prescription for tree parts. *See* Appendix, at Vol. 1, Commonwealth Court Opinion, pp. 30a-32a. The Commonwealth Court of Pennsylvania further held that the Koreskos' challenges to the validity of the subdivision and development plan for the Property were exclusively through the Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, *as* amended, 53 P.S. §§ 10101-11202 ("MPC"). The Commonwealth Court of Pennsylvania also held that the Koreskos had no standing to assert an equity action regarding the removal of trees alleged to have been shown on the approved subdivision plan because they pled no individualized harm occasioned by the alleged removal of such trees. *See* Appendix, at Vol. 1, Commonwealth Court Opinion, pp. 34a-39a. Finally, the Commonwealth Court of Pennsylvania held, among other things, that the Koreskos' claim to enjoin a setback violation was moot. *See* Appendix, at Vol. 1, Commonwealth Court Opinion, pp. 39a-41a.

After the Commonwealth Court of Pennsylvania issued its opinion in this case, the Koreskos filed petitions for allowance of appeal to the Supreme Court of Pennsylvania. By order dated August 9, 2004, the Supreme Court of Pennsylvania denied the Koreskos' respective petitions for allowance of appeal. *See* Appendix, at Vol. 1, pp. 1a-2a.

On November 8, 2004, the Koreskos filed the instant Petition for Writ with the Clerk of this Supreme Honorable Court.

B. Pertinent Factual Background

In December of 1999, Bower filed a subdivision plan with Tredyffrin Township to subdivide the Property into two (2) parcels. The Tredyffrin Township Board of Supervisors approved the subdivision plan ("Subdivision Plan") in February of 2000. Following the approval, Bower signed the approved Subdivision Plan and caused it to be recorded in

the Office of the Recorder of Deeds of Chester County, Pennsylvania.[7]

The Koreskos' Property shares a common boundary with a portion of the Property, being 1175 Seaton Ross Road (Lot 2 on the Subdivision Plan). In the Amended Complaint, the Koreskos alleged that, prior to subdivision, "several mature[8] trees existed" along the common boundary between the Koreskos' Property and what was then known as the Grupps' property (1175 Seaton Ross Road), and that improvements to the Property, being done by the Farley Respondents, had done harm to the root systems of the trees along the common boundary. *See* Appendix, at Vol. 1, Amended Complaint, ¶ 20, pp. 176a-177a. In their Amended Complaint, the Koreskos argued that they had acquired an "easement" against the Property with respect

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[7] The Subdivision Plan was recorded on March 23, 2000, in the Office of the Recorder of Deeds of Chester County, Pennsylvania, as Plan No. 15312. At one of the arguments in this case on the subject motions, the learned trial court took judicial notice of the recorded Subdivision Plan, which is expressly referred to in the Amended Complaint, without objection by the Koreskos. The Subdivision Plan was part of the reproduced record before the Commonwealth Court of Pennsylvania and the Supreme Court of Pennsylvania.

[8] Although in the Koreskos' Petition for Writ they claim the trees allegedly injured are "ancient," in their Amended Complaint, the Koreskos never referred to the trees as ancient, but only as "mature." Moreover, said trees are not of ancient origin. While the real age of said trees has not been conclusively established, the subject trees are not of, nor did the Koreskos in the trial court contend that the subject trees are of, historical or ancient importance or significance but are only common, (apparently) fully grown trees existing on a residential lot. Usually, in order for a tree or trees to be considered "ancient," which is a term of art, the particular tree or trees must be old for its/their particular species. *See* David Yarrow, *Defining Old Growth*, The Earth Restoration and Reforestation Alliance (June 2002). A numerical value for being qualified as ancient varies with each tree species. *Id.* A pitch pine is old at 90 years, while a hemlock or oak reaches maturity only at 150 years and commonly lives for four (4) or five (5) centuries. *Id.* The Koreskos' instant claims that the subject trees are allegedly "ancient" is therefore a misstatement of fact and an issue which was not presented in the trial court.

to the root systems of their trees and that said "easement" was to have been displayed on the Subdivision Plan. *See* Appendix, at Vol. 1, Amended Complaint, at ¶¶ 67, 72, and 74, pp. 183a-184a. Of note, at no time in the trial court did the Koreskos claim a license, permanent or otherwise, or anything other than an "easement."

The Koreskos allege they sent a letter to Tredyffrin Township, on June 6, 2000, "protesting the subdivision and building permits." However, the Koreskos never filed an appeal from the decision of the Tredyffrin Township Board of Supervisors with respect to the approval of the subdivision, as is required by the MPC, 53 P.S. §§ 10101-11202.[9]

The Grupps closed on 1175 Seaton Ross Road (Lot 2 on the Subdivision Plan) on June 26, 2001. The Kayes closed on 1185 Seaton Ross Road (Lot 1 on the Subdivision Plan) on June 29, 2001.

ARGUMENT

Preliminarily, it is important to note that the Amended Complaint filed by the Koreskos in this case contained six (6) separate, inexplicit, and unlabeled counts, purportedly against all named defendants.[10] In the Amended Complaint, the Koreskos did not name any type or cause(s) of action, including any federally recognized claim under 42 U.S.C. § 1983, nor did the Koreskos allege

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[9] As noted *supra*, the Pennsylvania Rules of Civil Procedure relating to pleading practice require fact pleading. In response to allegations raised by the Farley Respondents, in their new matter to the Amended Complaint, that the Koreskos did not appeal the granting of the subdivision approval, the Koreskos did not specifically deny, as required by Pa.R.C.P. No. 1029(a), the factual allegations asserted by the Farley Respondents regarding the same. Therefore, pursuant to Pa.R.C.P. No. 1029(b), the Koreskos are deemed to have admitted the fact(s) that they did not file an appeal of the grant of subdivision approval for the Property within the thirty (30) day period required by the MPC.

[10] The Original Complaint also listed six (6) inexplicit, unlabeled counts against all the named defendants [with the exception of the Grupps and the Kayes who were added as parties with the filing of the Amended Complaint].

which count(s) were asserted against which named defendant(s). Further, the Amended Complaint only contains one (1) *ad dannum* clause setting forth the relief requested by the Koreskos and it appears on the very last page of the Amended Complaint. Notwithstanding, at all times material to this matter, the Farley Respondents, the Grupps, and the Kayes characterized the Amended Complaint as setting forth claims for: a prescriptive easement and/or easement by implication over the Property[11]; a defective subdivision of the Property; trespass; civil conspiracy; and some unidentified form of equitable and/or injunctive relief. At no time material to this matter did the Koreskos object to the aforementioned characterizations of the Koreskos' claims in the Amended Complaint by the Farley Respondents, the Grupps, and/or the Kayes nor to the trial court's acceptance of those characterizations.

I. The Koreskos have failed to set forth in their Petition for Writ the considerations governing review on certiorari as required by Supreme Court Rule 10.

As this Supreme Honorable Court is certainly aware, and although neither controlling nor fully measuring this

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[11] In their Petition for Writ, the Koreskos argue that they have a cognizable property right in the form of a permanent license. The learned trial court was never asked to review the potential applicability of any doctrine of license to the allegations of this case. The first, and only, time that the Koreskos raised the issue of an alleged "license" was in the petition for allowance of appeal filed by Bonnie Koresko with the Supreme Court of Pennsylvania. There, Mrs. Koresko, for the very first time in this matter, claimed to hold an "irrevocable license" with respect to the Property. Of note, in the Amended Complaint, the phrase "irrevocable license" does not appear anywhere. Because the claim of an "irrevocable license" was not raised before the learned trial court, nor the intermediate appellate court, the Supreme Court of Pennsylvania correctly decided not to entertain the issue because it had not been properly presented nor preserved. Since the issue of an alleged "license" under applicable state law was not properly raised in the state courts, this Supreme Honorable Court should not consider it here.

Supreme Honorable Court's discretion, the character of reasons to be considered in reviewing a petition for writ of certiorari are as follows:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

See Supreme Court Rule 10(a)-(c).

Here, the Koreskos do not set forth any of the reasons, as articulated in Supreme Court Rule 10(a)-(c), to support a grant of their Petition for Writ. This matter does not involve a decision of a United States court of appeals. This matter does not involve the Supreme Court of Pennsylvania deciding an important question of federal law in conflict with any decision of another state court of last resort or of a United States court of appeals. This matter does not involve a state court or a United States court of appeals deciding an important question of federal law that has not been, or that should be, settled by this Supreme Honorable Court. This matter also does not involve a decision regarding an important federal question which

conflicts with relevant decisions of this Supreme Honorable Court.

Rather, this matter involves the interpretation and application of uniquely state laws and state property rights, nothing more and nothing less. Although the Koreskos attempt to persuade this Supreme Honorable Court that this matter involves the denial of due process, because no federally protected right is at issue and because no state property right(s) exists, there can be no denial of due process, either substantively or procedurally.

II. The Koreskos cannot establish a due process violation.

The primary question(s) that the Koreskos ask this Supreme Honorable Court to consider is whether the lower courts erred by failing to address the Koreskos' claims under 42 U.S.C. § 1983 for a violation of the Koreskos' due process rights in violation of the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment to the United States Constitution provides in part that "[n]o state . . . shall . . . deprive any person of life, liberty, or property, without due process of law." *See* U.S. CONST. amend. XIV. This provision of the United States Constitution has been interpreted as having both substantive and procedural components. *See Planned Parenthood of S.E. Pennsylvania v. Casey*, 505 U.S. 833, 846-847 (1992); *Keim v. County of Bucks*, 275 F. Supp.2d 628 (E.D. Pa. 2003).

The Civil Rights Act provides for civil redress by plaintiffs alleged to be injured by persons or entities acting under color of state law in violation of the United States Constitution or laws of the United States. 42 U.S.C. § 1983. To prevail on a § 1983 claim, a plaintiff must prove that: (1) the defendants acted under color of state law; (2) depriving the plaintiff of a right secured by federal law; and (3) damages. *See Sameric Corp. of Delaware, Inc., v. City of Philadelphia,* 142 F.3d 582, 590 (3d Cir. 1998); *Kelly v. Borough of Sayreville, N.J.,* 107 F.3d 1073, 1077 (3d Cir. 1997); *Mark v. Borough of Hatboro*, 51 F.3d 1137,

1141 (3d Cir. 1995). In their Petition for Writ, the Koreskos contend that the right of which they were deprived was the right to due process of law under the Fourteenth Amendment to the United States Constitution. Although in their Petition for Writ, at p. 4 thereof, the Koreskos contend that they sought to "protect both substantive and procedural rights in the protection of their property interest," as is addressed within, the Koreskos fail to set forth any cognizable federal or state law right so as to state a claim under 42 U.S.C. § 1983.[12] Of note, in their Petition for Writ, the Koreskos confuse and intertwine their substantive and procedural due process claims. Because meaningful discussion requires that these different components of due process be addressed separately, the Farley Respondents address each component seriatim.

A. Substantive Due Process

As a threshold matter, to maintain a cause of action under either a substantive or procedural due process theory, a plaintiff must establish that he has a protected property interest to which the Fourteenth Amendment's due process protection applies. *See Gikas v. Washington School District*, 328 F.3d 731, 735 (3d Cir. 2003). However, there is a clear distinction between the protection afforded to property interests which arise under state law and those which arise under the United States Constitution. As a result, property interests protected by procedural due process are not necessarily protected by substantive due process. *Id.*

To state a substantive due process claim, a plaintiff must have been deprived of a "particular quality of property

[12] Although at p. 4 of their Petition for Writ, the Koreskos contend that "[i]n the courts below Petitioners advanced a properly plead action under 42 U.S.C. §§ 1983, [sic] and 1985," the Koreskos' Petition for Writ is devoid of any argument or discussion of their alleged Section 1985 claim. Consequently, any issue with regard to any alleged Section 1985 claim that the Koreskos may have raised in the courts below has been abandoned and is not properly before this Supreme Honorable Court for review or consideration.

interest," not just one which is determined by reference to state law but one which is "fundamental" under the United States Constitution. *See Nicholas v. Pennsylvania State University*, 227 F.3d 133, 139-140 (3d Cir. 2000). Whether a certain property interest embodies the required particular quality depends on whether that interest is fundamental under the United States Constitution. *Id.*

In their Petition for Writ, the Koreskos do not cite to any authority for the proposition that an alleged easement falls within the narrow definition of a fundamental property interest. Moreover, the finding of the existence of an easement over the Property is a wholly state law created property right and bears little resemblance to other rights and property interests deemed fundamental under the United States Constitution. "In cases where the plaintiff complains that he has been unreasonably deprived of a state-created property interest . . . the plaintiff has not stated a substantive due process claim." *Kauth v. Hartford Ins. Co. of Illinois*, 852 F.2d 951, 958 (7th Cir. 1988). Notably, the United States Constitution protects a private property owner's right to *exclude* others from private property. *See Kaiser Aetna v. U.S.*, 444 U.S. 164, 179-180 (1979). Because this matter does not involve a fundamental property interest, the Koreskos do not, and cannot, state a substantive due process claim under 42 U.S.C. § 1983.

B. Procedural Due Process

As with a substantive due process claim, a § 1983 claim for violation of procedural due process rights requires that a plaintiff prove that he was deprived of a property interest under color of state law without due process. *See Dykes v. Southeastern Pennsylvania Transportation Authority*, 68 F.3d 1564, 1570 (3d Cir. 1995), *cert. den.*, 517 U.S. 1142 (1996). To establish a cause of action for a violation of procedural due process, a plaintiff must prove that a person acting under color of state law deprived him of a protected interest and that the state procedure for challenging the deprivation does not satisfy the requirements of procedural due process. *See Midnight*

Sessions, Ltd., v. City of Philadelphia, 945 F.2d 667, 680 (3d Cir. 1991), *cert. den.*, 503 U.S. 984 (1992). In the context of procedural due process claims, the threshold inquiry is whether the complainant has been deprived of property. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). "Property interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538 (1985) (*citing Board of Regents of State Colleges v. Roth*, 408 U.S. at 577); *Paul v. Davis*, 424 U.S. 693, 708-709 (1976), *reh'g den.*, 425 U.S. 985 (1976). If such property interest is deprived, due process requires notice and a meaningful opportunity to be heard. *Midnight Sessions, Ltd.*, 945 F.2d at 680.

Further, where the plaintiff alleges that the deprivation of his property was unauthorized by state law, the state need not provide predeprivation process but instead need only provide a postdeprivation remedy. *Zinermon v. Burch*, 494 U.S. 113 (1990); *Hudson v. Palmer*, 468 U.S. 517 (1984). This analysis applies to deprivations of liberty as well as property. *Zinermon*, 494 U.S. at 132. The plaintiff must plead the inadequacy of state process to state a claim for violation of procedural due process rights. *National Communication Systems v. Michigan Public Service Commission*, 789 F.2d 370 (6th Cir. 1986), *cert. den.*, 479 U.S. 852 (1986).

Because the due process clause requires, in the first instance, the existence of a cognizable right under state law, and because no right(s) exist here, as discussed *infra.*, the Koreskos' Petition for Writ should be denied.

1. The Koreskos cannot establish a property right under Pennsylvania law because Pennsylvania law does not recognize an easement and/or easement rights for tree roots.

Instantly, the Commonwealth Court of Pennsylvania in affirming the learned trial court, held that, as a matter of law, easement rights for encroaching tree parts are not

recognized under Pennsylvania law.[13] The Commonwealth Court of Pennsylvania's decision in this case is entirely consistent with Pennsylvania law and sound public policy considerations.

Under Pennsylvania law, a party may obtain rights over the lands of another via a prescriptive easement or via an easement by implication. A prescriptive easement is created by adverse, open, continuous, notorious, and uninterrupted use of land for twenty-one (21) years. *See Martin v. Sun Pipe Line Co.*, 542 Pa. 281, 666 A.2d 637, 640 (1995). A party asserting a prescriptive easement must demonstrate each element of such easement by proof that is *clear and positive*. *See Burkett v. Smyder*, 535 A.2d 671 (Pa. Super. 1988) (emphasis added).

In order to establish the existence of an easement by implication, it is necessary to show that the use was *actually known* to the purchaser of the servient tenement, or was so open and notorious as to put him on notice of the probable existence of the easement. *See Fidelity-Philadelphia Trust Co., v. Wengert*, 67 Pa. D. & C. 351 (1947) (emphasis added).

However, invading tree roots constitute a nuisance which is akin to branches that overlay on a neighboring property. *See Keiper v. Yenser*, 42 Pa. D. & C.2d 1 (Carbon Co. 1966). In Pennsylvania, a landowner may always cut away to his property line branches and roots from trees of the adjoining owner; a showing that the encroaching tree limbs, branches, or roots have caused sensible damage is not a precondition to a landowner's exercising a self-help remedy. *See Jones v. Wagner*, 624 A.2d 166 (Pa. Super.

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[13] In their Petition for Writ, the Koreskos repeatedly mention the theory and doctrine of "license." As noted *supra*, at footnote number 11, the Koreskos never raised the issue or doctrine of license, nor asked that the same be applied, in the trial court or in the Commonwealth Court of Pennsylvania. Therefore, any argument that the Koreskos present with regard to the issue of license has not been properly presented or preserved and should be disregarded by this Supreme Honorable Court.

1993), *app. den.*, 536 Pa. 626, 637 A.2d 286 (1993). Pennsylvania law affords a full panoply of remedies, including self-help, to a landowner whose property has been encroached by intruding and/or overhanging branches or tree limbs. *Id.*

Essentially, the Koreskos contend that the Pennsylvania courts erred in holding that Pennsylvania does and/or will not recognize a cause of action and/or easement(s) for tree roots and branches. *See* Appendix, at Vol. 1, Amended Complaint, ¶¶ 66, 67, and 68, p. 183a. In the trial court, the Koreskos stated that an easement for the "root systems" of their trees and other foliage exists over the Property pursuant to the theories of adverse possession and easements. *See* Appendix, at Vol. 1, Amended Complaint, at ¶¶ 66, 67, and 68, p. 183a. Of note, in their Amended Complaint, the Koreskos only contended that the roots of their trees, and not the branches thereof, have an alleged easement as to the Property. *See* Appendix, at Vol. 1, Amended Complaint, p. 172a-190a.

a. The Koreskos' easement claims are contrary to longstanding Pennsylvania law.

The Koreskos now seek to alter decades of precedent and Pennsylvania property rights law. Further, the Koreskos would have this Supreme Honorable Court overturn, throughout the nation, existing state laws on this issue and impose one general, blanket law on all states regarding the "rights" of tree roots throughout our country. In so doing, the Koreskos ask that this Supreme Honorable Court treat tree roots in suburban Pennsylvania the same as tree roots in the Sequoia National Forest in California. The Koreskos have not offered, nor did they offer in the Pennsylvania courts below, any good reason(s) for changing Pennsylvania law nor have the Koreskos proffered any compelling federal issue or question which requires action by this Supreme Honorable Court in this matter.

Property rights are unique to each state. In Pennsylvania, encroaching tree branches and tree roots are

considered trespassers, and, as such, they should not be accorded special treatment under the law.[14] The law in Pennsylvania is clear that a landowner can stop, and cut back to the property line, intruding branches and/or roots from entering upon his/her property from an adjoining landowner. *Jones,* 624 A.2d at 171. It is not necessary for the landowner to allege any actual injury or damage caused by the invading branches and/or roots. *Id.* There also is no need to allege harm in an action for trespass caused by the branches and/or roots of trees of another because the harm is not to the physical well being of the land, but to the *encroached upon landowner's right* to peaceably enjoy full and exclusive use of his property. *Id.* If one is only exercising his/her right to trim the branches and limbs of the encroaching trees, then they may *not* be held liable in damages for doing so. *Id.* (*citing Rosa v. Oliviera*, 342 A.2d 601 (R.I. 1975)) (damages not available for harm to encroaching shrubbery caused by party exercising common law right to self-help).

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[14] In the Pennsylvania courts below, and as contained in the Koreskos' petitions for allowance of appeal filed with the Pennsylvania Supreme Court, the Koreskos essentially contended that Pennsylvania law should recognize an easement for tree roots and branches under the "language" in *Jones v. Wagner, supra.* In *Jones*, the Superior Court of Pennsylvania, in *dicta* and in a footnote, stated that where there are encroaching tree branches, held openly, notoriously, hostilely, and continually for 21 years, and where actual harm is suffered to the tree owner's tree for the first time during the 22nd year, Pennsylvania law would not prohibit the finding of a prescriptive easement "in this situation." *Jones*, 624 A.2d at 171, n.3. Notwithstanding this nonprecedental statement, the Superior Court of Pennsylvania held in *Jones* that Pennsylvania law affords a "full panoply" of remedies to a landowner whose property is encroached by overhanging branches or tree limbs and that where one is "only exercising their right to trim branches and limbs of encroaching trees, they [the trimming party] *may not be held liable in damages for doing so.*" *Id.* Therefore, in *Jones*, the Superior Court of Pennsylvania reiterated longstanding Pennsylvania law that a landowner may trim encroaching branches [and so it follows, roots] over [or for that matter under] his property. The Koreskos even recognize this holding and that the reflections of the *Jones* court "were in dicta." *See* Petition for Writ, at p. 23.

To hold that the root systems of the Koreskos' trees and other foliage are entitled to an easement over the Property is contrary to longstanding Pennsylvania precedent. Further, to hold and impose one blanket national law regarding the "rights" of tree roots is absurd, draconian, and impractical. There is no basis or support for a national law on this issue, and Congress has not chosen to enter or act in this limited realm. A national law also would create uncertainty throughout the country regarding other apparently conflicting and/or inconsistent statutes or state court rulings. Because no federal issue or question exists in this matter and because Congress has not chosen to enter into this realm, neither should this Supreme Honorable Court.

Moreover, the Commonwealth Court of Pennsylvania's adoption of the reasoning and holding in *Pierce v. Casady*, 711 P.2d 766 (Kan. Ct. App. 1985), was prudent. In particular, the Commonwealth Court of Pennsylvania's approval of the following passage from *Pierce* makes sense, is entirely consistent with prior Pennsylvania caselaw, and should remain the law of Pennsylvania (and Kansas):

> The result reached here will be distasteful to all who treasure trees. The philosophy of the law is simply that whenever neighbors cannot agree, the law will protect each owner's rights insofar as that is possible. Any other result will cause landowners to seek self-help or to litigate each time a piece of vegetation starts to overhang their property for fear of losing the use or partial use of their property as the vegetation grows.

See Appendix, at Vol. 1, Commonwealth Court Opinion, pp. 31a-32a (*citing Pierce*, 711 P.2d at 768).

Finally, and as stated by the Commonwealth Court of Pennsylvania, the consequences of adopting the holding urged by the Koreskos are untenable. Trees grow over property boundaries and streets, around utility lines, and even under sidewalks throughout the Commonwealth of Pennsylvania and the other 49 states and the District of Columbia. "A decision suggesting that the prolonged presence of these tree parts assures their unreduced

continuation could cause uncertainty. Both the extent of the prescriptive easement and its effect on public and private use are problematic." *See* Appendix, at Vol. 1, Commonwealth Court Opinion, p. 32a.

b. Even assuming *arguendo* that Pennsylvania law recognizes easement rights for the roots of Pennsylvania trees, the Koreskos cannot establish any entitlement to that right because they cannot establish any easement by prescription and/or implication over the Property.

(1) The Koreskos cannot establish the requisite 21 year time period.

The Koreskos' alleged property rights claims based on an alleged prescriptive easement and/or an easement by implication over, or more exactly under, the Property also fail because the Koreskos cannot establish the requisite time period under Pennsylvania law. As stated above, a prescriptive easement is created by adverse, open, notorious, and uninterrupted use of land for twenty-one (21) years. *See Martin*, 666 A.2d at 640.

The Koreskos cannot establish the twenty-one (21) year time period necessary to establish under Pennsylvania law a property right based on a prescriptive easement. The Koreskos have not owned their property for twenty-one (21) years, but rather have only owned it since June 3, 1996, or for less than eight (8) years, which fails to meet the required requisite time period. Therefore, one crucial, critical and threshold element of the Koreskos' alleged property rights claim based on a prescriptive easement under Pennsylvania law was and is incapable of being established.

(2) The Koreskos cannot establish tacking.

The Koreskos also cannot establish "tacking" under Pennsylvania law in order to meet the requisite time period necessary to obtain a prescriptive easement.[15] There is nothing, direct and/or indirect, from which an inference can be drawn to indicate that the deed to the Koreskos for

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[15] Tacking is a concept of Pennsylvania law which permits a landowner to "tack" together the ownership of prior successors in title to establish the requisite twenty-one (21) year time period necessary for a claim of adverse possession or a prescriptive easement. In order for possession to be tacked, so as to establish the required twenty-one (21) year time period, there must be privity between the successive occupants of the property. *Watkins v. Watkins*, 775 A.2d 841, 846 (Pa. Super. 2001). In the petition for allowance of appeal to the Supreme Court of Pennsylvania filed by Bonnie Koresko, Mrs. Koresko cited to *Zeglin v. Gahagen*, 571 Pa. 321, 812 A.2d 558 (2002), apparently in an effort to argue that tacking was unnecessary. However, the holding in *Zeglin* is limited to the "setting" of that case and is distinguishable because it involved a *consentable boundary based on acquiescence*, and **not** *an easement by prescription or implication*. In *Zeglin*, two neighboring properties were separated by a row of "obvious[ly] presen[t]" bushes and a fence which was believed to mark the properties' boundary line. The Zeglins, the new owners, upon having the property surveyed, learned, among other things, that the bushes were not on the property line and removed them. In response, the Gahagens filed an action against the Zeglins for ejectment and trespass, claiming ownership up to the line previously demarcated by the bushes and the fence. In reversing the lower court's decree *nisi* in favor of the Zeglins, the Supreme Court of Pennsylvania held that due to the bushes' "obvious presence as [an] apparent boundary," that the purchaser [the Zeglins] is "put on notice to inquire about its origin, history, and function." *Id.* Then, if the structure has been in place for in excess of 21 years, the chips [and bushes] will be allowed "to fall where they may, for reasons of equity and peace." *Id.* at 566. Instantly, there are no allegations that the trees and/or other foliage on the Koreskos' Property formed any type of consentable or obvious boundary line with the Property. Further, the structures at issue here, the roots and root systems, are not obvious nor can their presence be known because they are underground, subterranean features not visible to the naked eye or a casual observer. This case is not, and never was, a consentable boundary case. Therefore, *Zeglin* is not on point, is distinguishable, and any reliance on it by the Koreskos was misplaced. Notably, the Koreskos do not mention *Zeglin* here.

their property included any tree roots or any inchoate and/or subterranean rights of any kind and specifically prescriptive easement rights. *See Croyle v. Dellape*, 832 A.2d 466 (Pa. Super. 2003).[16]

The deed to the Koreskos for their property does not reference, explicitly or implicitly, any easement(s) pertaining to roots or other subterranean features of and/or on the Koreskos' Property. The deed to the Koreskos for their property also does not reference, explicitly or implicitly, any easement(s) pertaining to roots or other subterranean features of and/or on the property of the Grupps and/or Kayes. Thus, tacking cannot be established by the Koreskos as a matter of Pennsylvania law. Tacking was therefore not proper in this matter and could not be used by the Koreskos in an attempt to establish the requisite time period needed under Pennsylvania law for a prescriptive easement (that is even if one could be established).

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[16] In *Croyle*, owners of lots in a subdivision filed an ejectment action against an owner neighbor for encroachment on a street easement in favor of all owners. The neighbor owner claimed title by adverse possession. The court held that when an adverse possession claimant of disputed land has not possessed the land for the required 21 year time period, the claimant must tack its predecessor's period of adverse possession for adverse possession to exist. In order for adverse possession to be tacked, there must be "privity" between the successive occupants of the property. Acceptance of a deed describing boundary lines confines the premises conveyed to the area within the boundaries, and such a deed does not convey incohate rights acquired by incomplete adverse possession. *But see Zeglin*, 812 A.2d at 566 (Privity of estate not required for tacking on claims brought under theory of acquiescence of boundary. Tacking permitted in such *limited* context upon sufficient and credible proof of delivery of possession of land not within (but contiguous to) property described in deed.).

(3) Tree roots, being subterranean structures, can in no way be open and notorious so as to be given rights under Pennsylvania law.

The pleadings in this matter are further devoid of any believable allegations or averments that (1) the Farley Respondents were aware of the existence of the roots on the Property and/or that the roots were open and/or notorious (so as to establish a claim for an easement by implication); and (2) the roots have been openly, notoriously, continuously, and uninterruptedly invading the Property for 21+ years (so as to establish a claim for a prescriptive easement). Any roots of any trees and/or other foliage owned by the Koreskos and/or which are located on the Koreskos' Property, and which entered onto, or more accurately under, the land and/or property of the Grupps [whose property and lot bordered the Koreskos' Property], and/or even the Kayes' property [which does not border the Koreskos' Property], were subterranean in nature. The roots were not visible to the naked eye, were incapable of being observed, and were not actually known or capable of imputing knowledge of the same. *See Fidelity-Philadelphia Trust Co., v. Wengert*, 67 Pa. D. & C. 351 (1947) (Plaintiff sought easement by implication. Court held cesspool and sewer pipe connection located on neighbor's property are all underground and the alleged easement is not apparent or visible. Therefore, the defendants did not have either actual or constructive notice of its existence at the time they acquired the property. The request for restraining order was denied.).

The roots were not, nor could they be, open or notorious so as to satisfy elements necessary for a prescriptive easement and/or an easement by implication. Roots by their nature are not open and/or notorious, but rather inclandestine. They do not lend themselves to establishing the elements of a prescriptive easement and/or an easement by implication. Thus, as a matter of law, they can never obtain such an easement. As pointed out by the Commonwealth Court of Pennsylvania, this conclusion is analogous to the Supreme Court of Pennsylvania's decision

that the known presence of windows near a lot line does not create a prescriptive easement for light and air. *See Maioriello v. Arlotta*, 364 Pa. 557, 73 A.2d 374 (1950) (such an easement cannot be created by prescription).

Because the Koreskos could not establish the elements of open and notorious, their claim(s) of a prescriptive easement and/or an easement by implication failed under Pennsylvania law. Further, given that no right(s) exist and/or can be established under Pennsylvania law, no "protected interest" exists, and the Koreskos cannot state a procedural due process claim.

2. The Code of Tredyffrin Township is not constitutionally defective because the Koreskos cannot establish any constitutionally or state protected property interest and because the procedures available to the Koreskos to challenge the alleged deprivation of their rights, through the mandatory appellate procedural mechanisms contained in the Pennsylvania Municipalities Planning Code, were adequate.

a. The Koreskos do not possess any right(s) which would have entitled them to notice of the subdivision approval.

The Koreskos' claim that the Code of Tredyffrin Township is constitutionally defective (and thus violative of due process) because it fails to provide to a property owner, whose property is located adjacent to a proposed minor subdivision (as that term is defined in the Code of Tredyffrin Township), with notice of a pending subdivision. Notably, in the *ad dannum* clause of the Koreskos' Amended Complaint, the Koreskos did not seek to strike down the MPC and/or the Code of Tredyffrin Township as unconstitutional. This "constitutionality" argument is the Koreskos' newest attempt to resuscitate a fatally flawed Amended Complaint and the "claims" and "causes of action" contained therein.

Regardless, and as detailed within, the Koreskos cannot establish any constitutionally or even state protected property interest taken from them by anyone, and in particular a state actor. Without any protected property interest, there is no due process requirement that the Koreskos be provided with notice and an opportunity to be heard. Although the Koreskos would like this Supreme Honorable Court to believe that the Koreskos possess real state-created easement rights for the trespassing roots of their trees, and that these rights outweigh the rights of a private property owner in developing his property, no support exists for this argument.

Under Pennsylvania law, an application for subdivision which conforms to all the technical requirements of relevant ordinances *cannot* be denied based on deed restrictions. *See Gulla v. North Strabane Township*, 676 A.2d 709 (Pa. Cmwlth. 1996), *aff'd*, 551 Pa. 588, 712 A.2d 281 (1998). Further, a township is not permitted to consider purported private rights of individuals before granting subdivision approval. *See Gossman v. Lower Chanceford Township Board of Supervisors*, 503 Pa. 392, 469 A.2d 996 (1983). Municipal bodies have no authority to refuse approval of a subdivision because of the effect which the subdivision could have upon a purported private easement. *See Fioretti v. Pastore*, 6 Erie L.J. 69 (1980).

As found by this Supreme Honorable Court, state power to regulate private property is *limited* to the adoption of reasonable restrictions that do not amount to a taking without just compensation or contravene any other federal constitutional provision. *Kaiser Aetna*, 444 U.S. at 179-180. The United States Constitution protects the right of individuals to exclude others from private property. *Id.* Further, not every destruction or injury to property by government action has been held to be a "taking" in the Constitutional sense. *Armstrong v. U.S.*, 364 U.S. 40, 48 (1960).

As detailed at length above, the Koreskos cannot establish any protected property interest under either federal or state law. In the absence of such a property interest, the Koreskos' "due process" claims and assertion

that the Code of Tredyffrin Township is constitutionally defective are without merit.

b. The appeal procedures of the MPC provide adequate due process protection to the Koreskos.

Notwithstanding, the Code of Tredyffrin Township and the MPC provided the Koreskos with adequate procedures to challenge the Koreskos' perceived injury to their alleged (albeit non-existent) easement rights.

On February 28, 2000, the Board of Supervisors for Tredyffrin Township, Chester County, Pennsylvania, approved Bower's plans to subdivide and develop the Property into two (2) residential lots.

Pursuant to Chapter 181, titled "Subdivision and Land Development" of the Code of Tredyffrin Township[17]

> [a]ppeals from the actions of the Board of Supervisors or the Planning Commission with respect to any application for subdivision or land development approval shall be governed by the applicable provisions of Act 247, the Pennsylvania Municipalities Planning Act [sic] as they may be amended, or any successor legislation thereto.

Code of Tredyffrin Township, at § 181-69.

Under the MPC, the proceedings set forth in the articles concerning appeals are the ***exclusive mode*** for securing review of any ordinance, decision, determination, or order of the governing body of a municipality, its agencies, or officers adopted or issued pursuant to this act. *See Dunlap v. Larkin*, 493 A.2d 750 (Pa. Super. 1985) (emphasis added); 53 P.S. § 10916.1(b).

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[17] The Farley Respondents, the Grupps, and the Kayes asked the learned trial court to take judicial notice of the relevant provisions of the Code of Tredyffrin Township, which it did. Certain relevant portions of the Code of Tredyffrin Township are contained in the Appendix at pp. 3a-22a.

Pursuant to Section 11002-A of the MPC, 53 P.S. § 11002-A,

> All appeals from all land use decisions rendered pursuant to Article IX shall be taken to the Court of Common Pleas of the judicial district wherein the land is located and shall be filed within thirty (30) days after entry of the decision as provided in 42 Pa.C.S. § 5572 (relating to time of entry of order) or, in the case of a deemed decision, within thirty (30) days after the date upon which notice of said deemed decision is given as set forth in Section 908(9) of [the MPC].

53 P.S. § 11002-A.

The procedure set forth in Article X-A shall constitute the exclusive mode for securing the review of any decision rendered pursuant to Article IX of the MPC. 53 P.S. § 11001-A.

In their Amended Complaint, the Koreskos asserted substantive challenges to the granting of the subdivision approval for the Property. The Koreskos contended that the Subdivision Plan for the Property was defective because it failed to "note or display the existence of the trees in question along the common boundary" between the properties; failed to completely list the existence of easements; failed to display the existence of trees on the boundary line; and did not list proposed material improvements. *See* Appendix, at Vol. 1, Amended Complaint, ¶¶ 63, 74, 75, and 76, pp. 183a-184a.

Article IV of the Code of Tredyffrin Township governs subdivision procedures. Pursuant to Section 181-9.A(2), a minor subdivision is defined as one where

> (a) No street is to be constructed or widened; (b) No other public improvement is to be constructed which is intended to be dedicated to the township, the state or to common use in a common development; (c) No land disturbance activities will take place except those incidental to construction of a single-family dwelling on each lot; and (d) No more than five lots are created.

See Appendix, at Vol. 1, Code of Tredyffrin Township, § 181-9.A(2), p. 6a. Where an application qualifies as a minor subdivision, the requirements and procedures of Sections 181-12 and 181-13 of the Code of Tredyffrin Township, regarding preliminary plans, shall be waived. *See* Appendix, at Vol. 1, Code of Tredyffrin Township, § 181-9.C(1), p. 6a.

The Koreskos' sole remedy for any claims that they may have had with respect to the Subdivision Plan for the Property should have been raised, and preserved, by the appeal procedures set forth in the Code of Tredyffrin Township and the MPC. *See* Code of Tredyffrin Township, at § 181-69, *supra,* and 53 P.S. §§ 11001-A, *et seq*. The Koreskos had thirty (30) days from the granting of the subdivision approval to file an appeal thereof under the MPC. The Koreskos did not file an appeal of the granting of the subdivision approval within that thirty (30) day period, or at any time thereafter.[18]

Further, the Subdivision Plan was approved on February 28, 2000, and recorded with the Chester County Recorder of Deeds on March 23, 2000. The Koreskos had constructive notice of the Subdivision Plan by virtue of its recording with the Chester County Recorder of Deeds and therefore cannot claim that they are not bound by the thirty (30) day appeal period limitation. Even assuming *arguendo* that the Koreskos possessed a property right in the form of an easement under Pennsylvania law, the Koreskos were afforded due process by virtue of the appeal procedures contained in the MPC. In order to state a claim for failure to provide due process, a plaintiff must have taken advantage of the processes that were available to him, unless those procedures are unavailable or patently inadequate. *Bishop v.*

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[18] In the Koreskos' answer to the Farley Respondents' new matter, both of which the Koreskos have failed to include in the Appendix, the Koreskos did not, as required by Pa.R.C.P. No. 1029(b), specifically deny the factual averments that they did not appeal the granting of the subdivision approval within thirty (30) days. Therefore, pursuant to Pa.R.C.P. No. 1029(b), the Koreskos are deemed to have admitted the fact that they did not file an appeal of the granting of the subdivision approval for the Property within the required thirty (30) day time period.

Wood, 426 U.S. 341, 344 (1976). A due process violation is not complete when the deprivation occurs; it is not complete unless and until the state fails to provide for due process. *Id.*; *accord Zinermon*, 494 U.S. at 126. An individual is not denied procedural due process if a state provides the means by which he can receive redress for the deprivation. *Anselma Station, Ltd., v. Pennoni Associates, Inc.*, 654 A.2d 608 (Pa. Cmwlth. 1995) (*citing Parratt v. Taylor*, 451 U.S. 527 (1981)).

The Koreskos had available to them procedural means through which to contest the granting and approval of the Subdivision Plan. Instead of using those available procedural means, the Koreskos sat idly by. Mr. Koresko is a seasoned attorney, and he, even more than an average citizen, cannot claim ignorance of the mandatory procedures available to him. The Koreskos cannot now claim that they have been denied procedural due process.

The Koreskos had the right and the opportunity to redress their claims with Tredyffrin Township under the MPC. Because the Koreskos did not utilize the exclusive procedures of the MPC, any claims for a denial of procedural due process are without merit. Accordingly, the Koreskos' Petition for Writ should be denied.

CONCLUSION

For the foregoing reasons, the Farley Respondents respectfully request that this Supreme Honorable Court deny the Koreskos' Petition for a Writ of Certiorari.

Respectfuly submitted,

Date: December 16, 2004

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No. 04-

IN THE

Supreme Court of the United States

BONNIE J. KORESKO and
JOHN J. KORESKO, V.,

Petitioners,

v.

MARK FARLEY, SEATON ROSS, L.P., TOWNSHIP OF TREDYFFRIN, BRYN MAWR CUSTOM HOME, INC., and OLLIE BOWER,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENT, BOARD OF SUPERVISORS OF TREDYFFRIN TOWNSHIP IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

Does a municipality engage in state action and deprive a landowner of a protected property interest simply by approving a subdivision plan on behalf of a neighboring property in which the landowner has no recorded interest?

Assuming, *arguendo*, that a landowner has a protected property interest in land which is the subject of subdivision approval, may a landowner who fails to avail himself of the process available for challenging the approval of the subdivision plan in state court properly claim a deprivation of his procedural due process rights?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The due process clause of the Fourteenth Amendment provides, in relevant part, as follows:

> No State shall...deprive any person of life, liberty or property, without due process of law...

U.S. Const. Amend. XVI, § 1

Section 1983 of the Civil Rights Act provides, in relevant part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

42 U.S.C. § 1983.

STATEMENT OF THE CASE

In February, 2000, the Petitioners' next door neighbor, Ollie Bower, filed an application for approval of a subdivision plan for his property ("Bower Tract,")with the Board of Supervisors of Tredyffrin Township, Pennsylvania.[1] The Board of Supervisors approved the application during the course of a public meeting on February 20, 2000. No appeal was taken and the approved plan promptly was recorded in the Office of the Recorder of Deeds in Chester County, Pennsylvania.

Thereafter, Bower sold the property to a development company, Seaton Ross, LP, to construct houses on the newly-subdivided property. (App. 174a). During construction, the roots of trees adjacent to the boundary on Petitioners' property were damaged. (App. 179a).

Petitioners, John and Bonnie Koresko, own the property adjacent to the Bower Tract. (App. 175a). At no time during the proceedings before the Board of Supervisors did Petitioners appear or oppose the subdivision. In addition, Petitioners never challenged the approval of the subdivision plan by appealing the Board of Supervisors' decision to the Court of Common Pleas of Chester County or to any other court in Pennsylvania.

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[1] At the time the application was submitted, the Bower Tract was owned by Respondent Bower. Houses on the land were later constructed by Respondent Farley and purchased by Respondents Grupps and Kayes.

Nevertheless, several months after the subdivision approval was granted and after construction on the property commenced, Petitioners brought suit in the Court of Common Pleas of Chester County, Pennsylvania against the Township, the property owners and the developer in an attempt to set aside the subdivision approval and to obtain equitable relief. In their complaint, Petitioners contended that "ancient" trees on Petitioners' property contained root systems that extended "naturally and unabated" to the subject property for a period in excess of 21 years which in turn gave rise to an "easement," by adverse possession, on that portion of the "Bower Tract" where the roots were located. (Pet. 5). According to Petitioners, the Township's failure to consider this "easement" when it approved the subdivision plan rendered the approval invalid and required it to be set aside. Petitioners concede that they never recorded the easement.

Later, by separate pleading, Petitioners filed a motion to disqualify the Township's counsel, on the grounds that counsel's previous representation of John Koresko in an unrelated collection matter gave rise to a conflict of interest.

The Township filed a motion for judgment on the pleadings in which it argued that Petitioners failed to establish the existence of a constitutionally-recognized property interest in the tree roots – or more specifically, the subterranean soils permeated by the tree roots -- sufficient to state a claim for a violation of Petitioners' due process rights. The Township also opposed the Motion to Disqualify on the grounds that no actual conflict of interest existed. The trial court agreed with the Township on both counts, denied the motion to disqual-

ify counsel and granted the Township's motion for judgment on the pleadings. (App. 112a).

In its decision dismissing Petitioners' claims against the Township, the court found that there was no recognized property interest in tree roots which could be said to form the basis of a colorable procedural due process claim. In addition, the court found that even if such a protected property interest had been identified, there was no sufficient allegation that the Township's procedure for subdivision approval was in any way flawed or constitutionally defective. (R. 112a-113a). To the contrary, the court noted, the Township's ordinance followed the requirements of Pennsylvania's Municipalities Planning Code and hence, any challenge to the ordinance should be deemed a challenge to the Pennsylvania Municipalities Planning Code. The court dismissed this claim because no argument had been made to substantiate it. (App. 113a). The court denied as moot the Koreskos' motion to disqualify the township's counsel but noted that even if the court "had reached the merits of the motion, [it] would have been denied as being without merit" (App. 113a-114a).

After claims against the additional defendants were dismissed or withdrawn, Petitioners appealed. The Commonwealth Court of Pennsylvania agreed with the trial court that there is no easement for tree roots cognizable under Pennsylvania law and, accordingly, affirmed the Orders of the lower court. (App. 23a). Petitioners then filed petitions for allowance of appeal with the Pennsylvania Supreme Court but the Pennsylvania Supreme Court declined to hear the case. (App. 1a).

REASONS FOR DENYING THE PETITION

The petition should be denied for four reasons. First, the Pennsylvania courts are correct that Petitioners do not raise a constitutionally-recognized property interest protected under the Fourteenth Amendment and the Pennsylvania courts' decision in this regard do not conflict with decisions of this Court or the highest court of any other court of any state. Second, even if Petitioners could establish a constitutionally-protected property interest, Plaintiffs fail to establish how any action on the part of the Township interfered with those rights. Third, Petitioners failed to establish how they availed themselves of procedural safeguards in place in Pennsylvania and/or how those safeguards were constitutionally defective. Finally, Petitioners fail to explain how the Pennsylvania courts abused their discretion in denying Petitioners' motion to disqualify counsel for the Township. This case, then, does not present an issue worthy of review by this Court.

A. Certiorari is Unwarranted Because Petitioners Have Not Asserted and Do Not Possess A Constitutionally-Recognized Property Interest Under the Fourteenth Amendment That Gives Rise to A Procedural Due Process Claim.

In the Pennsylvania state courts, Petitioners asserted that Petitioners' procedural due process rights were violated by the Township when it approved the subdivision application submitted for the Bower Tract.

The Pennsylvania courts correctly held that this claim failed for two reasons – (i) because Petitioners failed to ar-

ticulate a constitutionally-protected property interest and (ii) because Plaintiffs failed to show that the procedures in place were defective.

It is well-settled that a Plaintiff seeking to assert a due process claim must identify: (i) a constitutionally protected property right to which the Fourteenth Amendment's due process protection applies as well as (ii) arbitrary and capricious government action which is not rationally related to a legitimate government interest and/or is motivated by bias, bad faith or improper motive. *DeBlasio v. Zoning Board of Adjustment for the Township of West Amwell*, 53 F.3d 592, 599-600 (3d Cir.), *cert. denied*, 516 U.S. 937 (1995); see also, *Anselma Station, Ltd. v. Pennoni Associates, Inc.*, 654 A.2d 608 (Pa. Cmwlth. 1995)(the existence of a property right is an essential element of a § 1983 claim.). The question of whether the property interest requirement has been met is generally a matter of law for the court to decide. *Id.*

In determining whether a property right exists, courts have recognized that property interests are not created by the Constitution, rather, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Acierno v. Cloutier*, 40 F.3d 597, 616 (3d Cir. 1994). Thus, when analyzing due process claims, courts must turn to state and local law to determine whether the plaintiff possessed a property interest which was abrogated by the governmental action. *Id.*

Accordingly, unless Petitioners in this case could establish that they possessed an easement, recognized under state law,

on the Property which protected the tree roots encroaching from their property, Petitioners could not establish that they were deprived of a property interest that would support a §1983 claim, even if those roots were damaged by development of the Bower Tract.

In this case, however, try as they might, Petitioners simply did not establish that they perfected an easement of any sort in the Bower Tract. In particular, they did not show that an enforeceable agreeement spontaneously arose under Pennsylvania law as a result of the subterranean permeation by tree roots across property lines. Indeed, the fundamental predicates of adverse possession -- which are open and notorious possession of land to the exclusion of the rightful owner -- obviously are completely absent from this case. Here, the instrusion by Petitioners' tree roots were neither "open" nor "notorious" and did not exclude the rightful owner from possession. Thus, Petitioners cannot establish a property interest - - let alone a constitutionally – protected property interest and, hence have failed to establish an essential element of their due process claim. Despite being directly challenged to do so Petitioners are unable to cite to a single case in which a Pennsylvania court has recognized such an easement and/or has applied the Fourteenth Amendment to such a claim.

The best Petitioners can do is cite to *Jones v. Wagner*, 425 Pa. Super. 102, 624 A.2d 166 (1993), a Pennsylvania Superior Court case that they contend stands for the proposition that such a right *could* exist. Specifically, Petitioners rely on a passing statement made in a footnote where the court "wonder[ed] whether the continued presence of encroaching tree branches, held openly, notoriously, hostilely, and con-

tinually for 21 years would create a prescriptive easement in the airspace in which they hang." *Id.* at 170-71 n.3. Petitioners' reliance on the language in this footnote to support their claim of an easement for *tree roots* is flawed for several reasons.

First, the *Jones* case involved tree branches, not tree roots. While Petitioners make reference in their Petitions to acquired easements in the branches of the subject boundary trees, it is clear from a review of the Amended Complaint that Petitioners only claimed an easement in the *root systems* of the trees. *See e.g.*, ¶ 67 "As a matter of law, the owners of the Koresko property have acquired an easement against the 1185 Property with respect to the root systems of the trees and other foliage along the boundary line"). Accordingly, even if the *Jones* Court meant to suggest that there could be a prescriptive easement in encroaching *tree branches*, that suggestion, in dictum, does not stand for the proposition that an easement could be found based on the location of *tree roots*.

Furthermore, even if Pennsylvania law specifically recognized that a easement could arise from the underground encroachment of in tree roots, which it does not, Petitioners cannot establish an easement by prescription, since, as they acknowledge, "It is ancient and unquestioned law that to acquire an easement by prescription, the exercise of possession must be adverse, open, notorious and uninterrupted for a period of at least twenty-one years." *Lewkowicz v. Blumish*, 442 Pa. 369, 371, 275 A.2d 69, 70 (1971) (citing *Fec v. Mickail*, 438 Pa. 439, 265 A.2d 800 (1970)). The proof of such exercise of possession must be by clear and positive evidence. *Id.*

Very simply, Petitioners cannot establish an easement by prescription because they cannot establish that the allegedly intruding tree roots were in open and notorious possession for twenty-one years. That the intrusion was underground makes it impossible to establish "open," "notorious" and "hostile". Moreover, there is no way to establish how long any intrusion occurred: even if one portion of a root is in existence for twenty-one years, it does not follow that the root in its entirety has been in existence for that same length of time. As aptly noted by the lower court, "it is simply ludicrous to argue that if a root or a branch encroaches on another's property to any extent whatsoever then the owner of the tree has an unlimited easement over the property of that other to the full extent that those branches or roots might grow over time." See trial court opinion dated December 4, 2002, p. 2-3 fn.1.

Moreover, the actual holding of *Jones* is directly contrary to Petitioners' position. Petitioners seek damages for injuries to their boundary trees as a result of Farley's construction of a driveway and other improvements along the boundary with the Bower Tract. Petitioners alleged that these improvements damaged the root systems of the boundary trees. In *Jones*, however, the Pennsylvania Supreme Court found that Pennsylvania law affords a "full panoply" of remedies to a landowner whose property is encroached by overhanging branches or tree limbs and that where landowners are "only exercising their right to trim branches and limbs of encroaching trees, they may not be held liable in damages for doing so." *Id.* at 168. Hence, if one were to extend the *Jones* holding to include tree root systems, it follows that the owner of the Bower Tract had the right under state law to trim, cut

back or otherwise interfere with any tree roots that encroached onto that Tract from Petitioners' property.

In sum, the Pennsylvania courts correctly concluded that Petitioners failed to identify a constitutionally-recognized property interest in this case. Petitioners have cited to no case law – and Respondents have found none – where an interest in tree roots has been found to merit constitutional protection. Accordingly, Petitioners' due process claims property were dismissed by the Pennsylvania courts.

B. Petitioners Cannot Establish that the Township, By State Action, Deprived them of Any this Interest.

Even assuming Petitioners could identify a protected property interest -- which they have not and cannot do – Petitioners cannot identify any action undertaken by the Township that caused a deprivation of that interest. For this reason as well, the Pennsylvania courts properly concluded that Petitioners' due process claims were without merit.

In reality, this case is simply a dispute between two adjacent property owners. Notwithstanding Petitioners' efforts to articulate a novel constitutional theory against that Township, they fail to cite any action by the Township that actually interfered with the trees, their roots, or for that matter, any easement Petitioners' allegedly possessed. To the contrary, the *most* that Petitioners allege about the Township is that it approved a subdivision application submitted to it without taking into consideration unrecorded and unperfected easements that Petitioners allegedly possessed. Conspicuously absent from Petitioners' arguments, however, is any allegation as to *how the Township was to know about the*

purported easement and/or how that interest was perfected. In this case, the alleged possessory interest never was recorded by Petitioners, and hence, even if relevant, did not exist as far as the Township was concerned. If Petitioners truly believed that they had obtained a possessory interest in the tree roots on the subject property, they had a duty and obligation to perfect that interest by recording it in the County Recorder of Deeds. Having failed to perfect this interest, Petitioners simply have no basis upon which to complain.

Moreover and perhaps more importantly, Petitioners' arguments ignore the fact that the Township's approval of the subdivision was not causally related to the actions on the Bower Tract that affected the trees. Nothing about the subdivision approval required the owners to remove tree roots. On the other hand, the Bowers Tract owners clearly could have dug up or severed the tree roots independent of subdivision approval from the Township.

In sum, it is clear that there is no basis upon which the Township's actions in approving a subdivision plan may be found inextricably intertwined with the landowner's removal of tree roots from the Bower Tract. Hence, Petitioners' constitutional claims also were properly dismissed for failure to identify the requisite state action.

C. Petitioner's Failure to Avail Themselves of Procedures in Place for Challenging the Approval of the Subdivision Plan Also Is Fatal to Their Procedural Due Process Claim.

Even assuming Petitioners could identify a protected property interest, they have not and indeed, could not, allege that the Pennsylvania procedures available to them under Pennsylvania state law for challenging the proposed subdivision of the Bowers Tract were defective. Thus, the lower courts' decision to dismiss Plaintiffs' procedural due process claims is correct for this reason as well.

Petitioners claim that they were entitled to relief because the Township *failed to revoke* the subdivision Plan, which Plaintiffs claim was defective.[2] However, Petitioners did not file a timely appeal from the Township's approval of that subdivision plan under the Municipalities Planning Code

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[2] Specifically, Petitioners alleged that the Subdivision was defective because it did not list the Petitioners' easement rights. However, even if Petitioners did have valid easement rights to the Property that were not listed on the Subdivision Plan, which they did not, the Township's failure to revoke said Plan does not give rise to a cause of action against the Township. The law in this Commonwealth is that a township is not permitted to consider an adjoining landowner's private easements in approving a subdivision plan. *Gulla v. North Strabane*, 676 A.2d 709 (Pa. Cmwlth. 1996) (citing *Michener Appeal*, 382 Pa. 401, 115 A.2d 367 (1955)). *See also Gossman v. Lower Chanceford Township Board of Supervisors*, 503 Pa. 392, 468 A.2d 996 (1983). Clearly, the Township did not have the discretion to consider the Koreskos' alleged easement rights when reviewing the Subdivision Plan.

("MPC"), 53 Pa.C.S. § 10101 et. seq., and, to the extent they knew about the approval, waived any claim that it was deficient.

Pursuant to the Township's Code "[a]ppeals from the actions of the Board of Supervisors or the Planning Commission with respect to any application for subdivision or land development approval shall be governed by the applicable provisions of Act 247, the Pennsylvania Municipalities [Code]." The relevant provision of the MPC provides as follows:

> All appeals from all land use decisions rendered pursuant to Article IX shall be taken to the Court of Common Pleas of the judicial district wherein the land is located *and shall be filed within thirty (30) days after entry of the decision* as provided in 42 Pa.C.S. § 5572 (relating to time of entry of order) or, in the case of a deemed decision is given as set forth in Section 908(9) of [the MPC].

53 P.S. § 11002-A (emphasis supplied).

The procedures set forth in Article X-A constitute the exclusive method for securing the review of any decision rendered pursuant to Article IX of the MPC. 53 P.S. § 11001-A. The requirement that appeals be taken under the MPC is mandatory. *Appeal of Cibula*, 25 Pa. Cmwlth. 333, 360 A.2d 812 (1976).

In this case, the subdivision plan was approved by the Township Board of Supervisors on February 28, 2000 (R.R. 724a at ¶ 15). Accordingly, Appellants had until March 30,

2000 to file an appeal pursuant to the MPC.[3] Because Appellants failed to appeal the granting of the subdivision approval in accordance with the mandatory provisions of the MPC, the Pennsylvania courts lacked jurisdiction over their claims regarding the alleged defectiveness of the Subdivision.

Moreover, to the extent that Petitioners' argument rests on a claim that Petitioners were deprived of due process because they did not have notice of – and therefore could not challenge – the subdivision approval within the thirty-day period and thus they have been deprived of their constitutional rights to due process for this reason as well, this claim, too, is without merit. First, in making this argument, Petitioners fail to acknowledge that the subject subdivision was of *their next door neighbor's* property, and the various decisions made by the Board were made in public meetings. Had Petitioners kept themselves informed, they would have been aware of their neighbor plans and the decision-making by the Board, in a timely manner. Petitioners also fail to recognize that even if they had not been aware of or received notice of the approval of the subdivision plan, they were not precluded from challenging that Township action once they became aware of it. In fact, a specific provision in the Municipalities Planning Code allows a party who believes he or she is aggrieved but learns of a decision in a land use case beyond the thirty day appeal period to file an appeal "nunc pro tunc" asserting the lack of notice as the grounds for the delay. Spe-

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[3] The Subdivision Plan was recorded with the Chester County Recorder of Deeds on March 23, 2000. Accordingly, the *very* latest Appellants arguably could have appealed was April 22, 2003.

cifically, the Municipalities Planning Code states, in pertinent part:

> [N]o person shall be allowed to file any proceeding with the board later than 30 days after [approval] if such proceeding is designed to secure reversal or limit the approval in any manner unless such person alleges and proves that he had no notice, knowledge, or reason to believe that such approval had been given." (Emphasis added.)

53 Pa.C.S. § 101914.1(a).

Therefore, had Petitioners truly believed they were aggrieved by the Township's decision to approve the subdivision of the Bower Tract, they could have filed an appeal nunc pro tunc, once they became aware of the subdivision approval. Petitioners' failure to invoke this remedy, too, is fatal to their claims.

In sum, the Pennsylvania courts properly recognized that Petitioners had not made out a claim under the Fourteenth Amendment. There is no conflict between this case and any other decided by this Court, and thus, this Court should deny Petitioners' petition in its entirety.

D. Petitioners Have Failed To Articulate A Cognizable Reason Why This Court Should Review The Pennsylvania Court's Decision Affirming The Denial Of The Motion to Disqualify the Township's Counsel.

Petitioners alternatively contend that this Court should grant certiorari to correct the Pennsylvania courts' Orders denying their request to disqualify the Township's counsel

based on an alleged conflict-of-interest. Specifically, Petitioners allege that counsel's previous representation of John Koresko in an unrelated collection matter should have precluded counsel from representing the Township in this case. Petitioners do not explain how this issue – clearly a matter of state law, within the discretion of the trial court and thus measured against an abuse of discretion standard by the state appellate courts – rises to the level of a claim worthy of this Court's review.

Moreover, in their attempt to raise this as an issue, Petitioners fail to provide a fair or complete statement as to the context for the lower court's ruling. The facts of this case demonstrate that the trial court denied the motion, and the Commonwealth Court affirmed the denial of this motion because once the Township was dismissed as a defendant in the action, the issue became moot. And, while Plaintiffs purport to claim that the court committed "reversible error" by failing to address the disqualification motion before rendering a ruling on the motion for judgment on the pleadings, Petitioners are unable to offer any case law to support this contention.

In order to establish an abuse of discretion and/or reversible error, Petitioners, of course, would have to show that there would have been a different outcome if the trial court had ruled on the motion to disqualify *prior to* the motion for judgment on the pleadings. This, too, is a burden Petitioners cannot meet. In denying the motion to disqualify as moot, the trial court nonetheless noted that, in any event, the motion would have been denied as without merit. Thus, even if the trial court had decided the motions in reverse order, the outcome would have been the same.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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